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Supreme Court, U.S.
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In The
Supreme Court of the United States

MARK E. OVERLAND, PAMELA POLOSKI,
OVERLAND & BORENSTEIN LLP,

Petitioners,

v.

COUNTY OF LOS ANGELES and
SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

After a court exonerates bail securing the appearance of a defendant at criminal court proceedings, do county governments and state superior courts violate the Fourteenth Amendment and the Takings Clause of the Fifth Amendment to the United States Constitution by confiscating and using interest actually earned on cash bail deposits after exoneration, contrary to the principles established in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) and *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), thereby requiring the payment of just compensation to the depositors under *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003)?

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

Mark A. Borenstein, *Overland Borenstein Scheper & Kim, LLP*, on behalf of *Mark E. Overland, Pamela Poloski and Overland & Borenstein LLP*, petitions for a writ of certiorari to review the judgment of the California Court of Appeal following denial of review by the Supreme Court of the State of California.

OPINION BELOW

The opinion of the California Court of Appeal entering judgment in favor of Respondents is unreported and is reprinted in the Appendix to the Petition for a Writ of Certiorari. *Overland v. Clarke,* Pet. App. 1-18.

JURISDICTION

On September 27, 2007, the California Court of Appeal entered its decision. On October 16, 2007, the Court of Appeal denied a petition for rehearing. On November 8, 2007, Petitioners timely filed for review in the California Supreme Court. On December 12, 2007, the California Supreme Court denied discretionary review. This Court's certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The relevant sections of the California Penal Code are also reprinted in the Appendix. Pet. App. 27-28.

STATEMENT OF THE CASE

Factual Background

California, every other state and the District of Columbia have enacted a statutory bail system under which a cash deposit may be posted with a judicial officer or agency to secure the attendance of the defendant at all judicial proceedings. Additionally, all states recognize that bail remains posted until exonerated by the court when proceedings terminate and

there is no further need to secure the appearance of the defendant in court.[1]

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[1] Ala. Code §§ 15-13-111, 15-13-113 (ALABAMA 2005); Alaska Stat. § 12.30.020, Rules of Criminal Procedure, Rule 41(5) (ALASKA 2007); 16A A.R.S. Rule of Crim. Proc., Rules 7.1, 7.6 (ARIZONA 2007); A.C.A. § 16-84-115, A. R. Cr. P. Rule 9.2 (ARKANSAS 2007); Cal. Penal Code §§ 1297, 1298 (CALIFORNIA 2007); Colo. Rev. Stat. §§ 16-4-104, 16-4-108 (COLORADO 2007); Conn. Gen. Stat. §§ 54-66, 54-66A (CONNECTICUT 2007); Del. Code Ann. tit. 11, § 2102, Sup. Ct. Crim. R., Rule 46(f) (DELAWARE 2007); D.C. Const., Article I, Bill of Rights, SCR Crim. R. Rule 116 (DISTRICT OF COLUMBIA 2007); Fla. Stat. § 903.16, Fla. R. Crim. P. Rule 3.131 (FLORIDA 2007); Ga. Code. Ann. § 17-6-4 (GEORGIA 2007); Haw. Rev. Stat. §§ 804-11.5, 804-19 (HAWAII 2007); Idaho Code §§ 19-2921, 19-2923 (IDAHO 2007); 725 Ill. Comp. Stat. § 5/110-8 (ILLINOIS 2007); Ind. Code § 35-33-8-3.2 (INDIANA 2007); Iowa Code §§ 811.2, 811.10 (IOWA 2007); Kan. Stat. Ann. §§ 22-2802, 22-2808 (KANSAS 2007); Ky. Rev. Stat. Ann. §§ 431.520, 431.530 (KENTUCKY 2007); La. Rev. Stat. §§ 15:86, 15:88 (LOUISIANA 2007); Me. Rev. Stat. Ann. tit. 15, §§ 1026, 1074 (MAINE 2007); Md. Code Crim. Proc. § 5-205 (MARYLAND 2007); Mass. Gen. Law. ch. 276, §§ 68, 70, 79 (MASSACHUSETTS 2007); Mich. Comp. Laws §§ 765.12, 765.13, 765.15 (MICHIGAN 2007); Minn. Stat. § 629.53 (MINNESOTA 2007); Miss. Code Ann. § 99-5-9 (MISSISSIPPI 2007); Mo. Rev. Stat. § 544.455, Fifteenth Judicial Circuit Rules, Rule 67.1.4 (MISSOURI 2007); Mont. Code Ann. §§ 46-9-121, 46-9-401 (MONTANA 2007); Neb. Rev. Stat. §§ 29-901, 29-1110 (NEBRASKA 2007); Nev. Rev. Stat. §§ 178.502, 178.522 (NEVADA 2007); N.H. Rev. Stat. Ann. §§ 597:2, 597:3 (NEW HAMPSHIRE 2007); N.J. Stat. Ann. § 3:26-4 (NEW JERSEY 2007); N.M. Rules Crim. Proc., Rule 5-401, Rules Crim. Proc. Rules 6-401, 6-401B (NEW MEXICO 2007); N.Y. Gen. Mun. Law Ch. 24 § 99-m; Crim. Proc. Law § 500.10(9); N.Y. Gen. Mun. Law § 99m (NEW YORK 2007); N.C. Gen. Stat. §§ 15A-531(4), 15A-534(4) (NORTH CAROLINA 2007); N.D. Rules Crim. Proc., Rule 46 (NORTH DAKOTA 2007);

(Continued on following page)

In California, the cash deposit is held as security for a criminal defendant's appearance, and is exonerated and returned to the depositor after the defendant appears in court as required. Cal. Penal Code §§ 1297, 1298. In this case, after exoneration of cash bail deposited by Petitioners, Respondents returned the principal amounts of the bail deposits, but have refused to pay to Petitioners any of the interest actually earned after exoneration on their cash deposits by Respondents' investment of the cash principal. All 57 counties in California engage in the same practice, and Petitioners believe interest actually earned after exoneration of bail is not paid to cash depositors in any other state.[2] Accordingly all states

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Ohio Rev. Code Ann. § 2937.22(A) (OHIO 2007); 22 Okla. Stat. §§ 1106, 1107 (OKLAHOMA 2007); Or. Rev. Stat. § 135.265(3) (OREGON 2007); Pa. Rule Crim. Proc., Rules 528(D)(1), 536 (PENNSYLVANIA 2007); R.I. Gen. Laws § 12-13-10, Sup. Ct. R. Crim. P. Rule 46 (RHODE ISLAND 2007); S.C. Code Ann. §§ 15-17-750, 17-15-190 (SOUTH CAROLINA 2007); S.D. Codified Laws §§ 23A-43-3(4), 23A-43-26 (SOUTH DAKOTA 2007); Tenn. Code Ann. § 40-11-118, 40-11-132 (TENNESSEE 2007); Tex. Crim. P. Code Ann. §§ 17.02 (TEXAS 2007); Utah Code Ann. § 77-20-4(1)(a), 77-20-7 (UTAH 2007); 13 Vt. Stat. Ann. § 7554(a)(1)(F), Vt. R. Crim. Pr. Rule 46 (VERMONT 2007); Va. Code Ann. §§ 19.2-119, 19.2-123(3) (VIRGINIA 2007); 10 Rev. Code §§ 10.04.040, 18.85.100 (WASHINGTON 2007); W. Va. Code §§ 62-1C-2(a), 62-1C-12 (WEST VIRGINIA 2007); Wis. Stat. §§ 818.24, 969.02(2), 969.03(1)(d) (WISCONSIN 2007); Wyo. R. Cr. P. Rule 46 (WYOMING 2007).

[2] *See, e.g.*, N.H. Rev. Stat. Ann. § 597:3 (NEW HAMPSHIRE 2007) ("All money deposited for bail shall be held for the use of the state until the clerk of the superior court where the bail is deposited shall certify that no liability exists against the

(Continued on following page)

are routinely confiscating millions of dollars belonging to their citizens, contrary to constitutional mandates established by this Court.

In this case in three separate criminal prosecutions in the Los Angeles County Superior Courts, Petitioners deposited cash to secure the appearance of three defendants. On September 21, 2000, Petitioner Overland deposited $500,000; on December 20, 2002, Petitioner Poloski deposited $35,000; and on July 12, 2003, Petitioner Overland & Borenstein deposited $250,000. *Overland v. Clarke*, Pet. App. 3-5.

In each case, the clerk of the superior court transferred the cash deposit to the Los Angeles County's auditor-controller, who deposited the money into a Los Angeles County trust fund called the "TK7 Trust Fund." The County invested the cash bail deposits and during the time period which is the subject of this action, earned an annual rate of return on the deposited cash between 2.45% and 6.38%. The interest actually earned was transferred to the Los Angeles County General Fund for general fiscal purposes. After exoneration, the cash was held and invested by Respondents for 42 to 45 days before

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bail."); Wyo. Stat. § 7-10-105 (WYOMING 2007) ("Any proceeds recovered as a result of the forfeiture of bail in any criminal case shall be paid into the county treasury to the credit of the public school fund of the county in which the defendant was admitted to bail."); but cf. Tex. Crim. P. Code Ann. § 22.16 (TEXAS 2007) (surety entitled to accrued interest less costs after forfeiture).

being delivered without interest to Petitioners. *Id.* at 4-5.

Each Petitioner demanded the interest earned on the bail from the date of exoneration to the date the principal deposit was refunded to the Petitioners. No interest payments have been made to Petitioners despite their demands. *Id.*

Proceedings Below

On September 26, 2003, Petitioners filed a complaint in the Los Angeles County Superior Court against the Respondents alleging, among other claims, the taking without compensation of the interest actually earned on their cash bail deposits in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The first cause of action demanded the return of interest earned before exoneration of the cash deposit; the second cause of action demanded return of interest earned after exoneration of bail by the superior court. Petitioners brought the action on behalf of themselves and all persons similarly situated. *Id.* at 5.

The Superior Court and its Clerk moved for judgment on the pleadings or, in the alternative, demurred to all claims asserted against them. On March 17, 2004, the trial court overruled the demurrer to the second cause of action (relating to post-exoneration interest), but otherwise sustained the demurrers without leave to amend with regard to the first cause of action, for pre-exoneration interest.

Thereafter, Petitioners filed a petition for writ of mandate seeking review of the trial court's order sustaining the demurrer to their first cause of action. *Id.* at 6-7.

The California Court of Appeal denied the petition. It held that the decisions of this Court in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) and *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), were inapplicable because they involved an "involuntary" taking of the interest earned on cash deposits, whereas in this case, Petitioners' cash deposits were "voluntary," as part of an implied unwritten contract. According to the California court, the contract was implied from California statutes, and the "[t]erms of the contract do not include a provision for interest on the deposit." Accordingly, the Court reasoned there could be no Takings claim. The Court of Appeal did not rule on the merits of the second cause of action for the taking of post-exoneration interest. *Id.* at 7-8, 13.

On May 11, 2005, the California Supreme Court denied discretionary review. Pet. App. 22.

Petitioners' Petition for Writ of Certiorari filed with this Court was denied on October 11, 2005. Pet. App. 23.

Following remand, all parties filed cross-motions for summary judgment on the second cause of action relating to post-exoneration interest. *Overland v. Clarke*, Pet. App. 9-10. On May 15, 2006, the trial

court granted Respondents' motion and denied Petitioners' motion, holding that interest earned post-exoneration is governed by the same contract principles established by the Court of Appeal in its prior decision relating to the first cause of action involving pre-exoneration interest. *Id.* at 10-11.

On June 29, 2006, the superior court entered judgment in favor of Respondents and on August 28, 2006 Petitioners filed notice of appeal from the judgment of the court. Pet. App. 19-21.

On September 27, 2007, the Court of Appeal, in an unpublished opinion, affirmed the judgment and on October 16, 2007, denied Petitioners' petition for rehearing. *Overland v. Clarke*, Pet. App. 1-18, 24-25.

On December 12, 2007, the California Supreme Court denied discretionary review. Pet. App. 26. Accordingly, under Rule 13-1, this Petition is timely.

SUMMARY OF ARGUMENT

Since at least the mid-1700's, English common law has recognized that "interest follows principal." *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 165 (1998). California also adheres to this long-established principle. *See Pomona City School Dist. v. Payne*, 9 Cal.App.2d 510, 512 (1935) ("interest accretions belong to [the] owner"). In applying this rule, this Court repeatedly has held that interest

earned on a cash deposit – whether an IOLTA Trust deposit, state court interpleader deposit or otherwise, is the property of the depositor along with the principal amount of the cash deposit. When the state appropriates the depositor's accrued interest, the state effects a *per se* physical taking under the Fifth Amendment, for which reasonable compensation is due. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), the property taken was the interest earned on an interpleader deposit. In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) and *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), the property taken was the interest actually earned on IOLTA trust accounts. In these cases, as in others, the cash deposit was not compelled and in each case, the depositor arguably obtained a benefit from making the cash deposit. Contrary to the decision of the California court below, this Court held in each of these cases the earned interest was involuntarily taken. Also contrary to the decision of the California court below, lower federal courts have consistently held that the unavailability of a contract remedy does not automatically preclude a Takings claim.

The Court of Appeal's decision here concerning post-exoneration interest conflicts with decisions of this Court and lower federal courts on a fundamental Fifth Amendment question that affects millions of people in this country and likely involves many millions of dollars in unlawfully confiscated interest.

Additionally, the Court of Appeal decision ignores the purpose of bail, which prevents the state from exercising control over bail deposits following exoneration of the bail.

Contrary to *Webb's Fabulous Pharmacies*, *Phillips* and *Brown*, the California Court of Appeal held Respondents did not engage in an unconstitutional taking by retaining interest earned after exoneration of Petitioners' cash bail deposit. Rather, the Court of Appeal decided the taking of the interest earned on the cash following exoneration was authorized by a contract which was implied from the California bail statutes. The Court of Appeal therefore made no distinction between interest earned *before exoneration* as part of the implied contract between depositor and Respondents, and interest *earned after exoneration* when the implied contract terminated. Even though the interest actually earned after exoneration was a separate *res* that was created entirely after the purpose of the bail deposit was fully satisfied, and under the "interest follows principal" belonged to the cash bail depositor, the court below still implied a waiver by the depositor of the interest earned after exoneration, because the bail statutes did not expressly provide for the payment of interest when the cash deposit was returned. The Court of Appeal therefore interpreted statutory law to confiscate the post-exoneration earned interest in exactly the same way the lower courts in Florida relied on the express provisions of a state statute to justify the taking of

the interest earned on interpleader deposits in *Webb's Fabulous Pharmacies*.[3]

Under the Fifth and Fourteenth Amendments, Petitioners' constitutional rights against the taking of private property without just compensation may not be abrogated either by characterizing the earned interest as subject to an express statutory mandate or an implied statutory term. After exoneration by a court, bail deposits are clearly beyond the control of the state and any interest earned on those deposits belongs to the depositor. Allowing the state to confiscate that interest without just compensation offends Fifth Amendment principles established by this Court. Accordingly, this Court should grant this petition for certiorari under Rule 10(c) of the United States Supreme Court Rules and address the conflict created by the California Court of Appeal "with relevant decisions of this Court."

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[3] In fact, the case against finding an unlawful confiscation was stronger in *Webb's Fabulous Pharmacies* than here, since there was nothing the lower Florida courts needed to imply to justify the taking. Unlike here, the lower courts in Florida permitted the taking of the interest based on a Florida statute that expressly provided the interest would be retained by the court. Nevertheless, this Court found the taking of the interest violated the Fifth Amendment.

ARGUMENT

I. INTEREST ACTUALLY EARNED AFTER EXONERATION ON A CASH DEPOSIT IS THE PRIVATE PROPERTY OF THE DEPOSITOR; WHEN A COUNTY OR COURT DOES NOT RETURN THE INTEREST TO THE DEPOSITOR, A *PER SE* TAKING OF PROPERTY SUBJECT TO THE TAKINGS CLAUSE RESULTS.

In order to establish a claim for an unconstitutional taking of property, Petitioners must first show the property taken is their private property. *See Ruckleshouse v. Monsanto Co.*, 457 U.S. 986, 100-1001 (1984); *Phillips*, 524 U.S. at 164. Here, Petitioners deposited their property – cash – in lieu of bail according to the California Penal Code statutes governing bail. *See, e.g.*, Cal. Pen. Code § 1297. California, by statute, recognizes that, after exoneration, this cash deposit is no longer subject to control by the government, but must be returned to the depositor. Cal. Penal Code § 1297.

This statutory recognition of the government's duty to forego control over the cash deposit once bail serves no valid function comports with the recognized purpose of bail. "The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court." *Reynolds v. United States*, 80 S.Ct. 30, 32 (1955). *See United States v. Ryder*, 110 U.S. 729, 736 (1884) ("the object of bail in criminal cases is to secure the appearance of the principal before the court for the purposes of public justice."). California

also has long recognized this self-evident principle. "The object of bail is to insure the attendance of the principal and his obedience to the orders and judgment of the court. There should be no suggestion of revenue to the state or county, nor punishment to the surety." *People v. Wilcox*, 53 Cal.2d 651, 698 (1960).

Therefore, a trial court exonerates bail when no further appearance by a defendant or compliance with court orders is required. Both such duties of the defendants in this case and the right of the Respondents to control the bail ended on exoneration of bail by the court. As of that time, the bail deposits no longer secured the obligations of the criminal defendants to appear in court and obey release conditions, and Respondents had no right to control the cash bail deposits. Respondents lawfully could only return the deposits to Petitioners, whose right to the return of the cash bail principal at exoneration was settled. Along with that cash principal, Respondents' right to any interest earned thereon also was fixed at exoneration.

Beginning with *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 161, this Court has consistently held that the interest earned on a cash deposit is the property of the depositor under the "interest follows principal" rule. *See also Phillips*, 524 U.S. at 165 ("rule that 'interest follows principal' has been established under English common law since at least the mid-1700's."). California follows this rule. *Pomona*

City School Dist. v. Payne, 9 Cal.App.2d 510, 512 (1935) ("interest accretions belong to [the] owner").

Accordingly, not only is the principal which earned the interest after exoneration the property of the depositor, but so is the earned interest. *Phillips v. Washington Legal Foundation*, 524 U.S. at 172. *See Anderson v. Spear*, 356 F.3d 651, 670 (6th Cir. 2004) (left over campaign contributions); *Schneider v. California Department of Corrections*, 345 F.3d 716, 718 (9th Cir. 2003) (interest on prisoner deposits cannot be appropriated for benefit of entire prison population); *McIntyre v. Bayer*, 339 F.3d 1097 (9th Cir. 2003) (same); *Arthur v. District of Columbia*, 857 A.2d 473, 492 (D.C. Cir. 2004) (appropriation of interest on interpleader funds deposited into court registry constitutes an unconstitutional taking); *Canel v. Topinka*, 793 N.E.2d 845, 853 (Ill. App. Ct., 2003) (dividends on stock temporarily held by state).

In *Webb's Fabulous Pharmacies*, this Court decided that a state violated the Takings Clause when it appropriated for itself, pursuant to state statute, the interest accrued on an interpleader fund deposited in the registry of a county court. "The usual and general rule is that any interest on the interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 162. *Brown* declared that the confiscation of the interest accrued on temporary cash

deposits is a *per se* taking[4] under the Fifth Amendment, because the accrued interest was physically taken:

> When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, [citation], regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.

Brown, 538 U.S. at 233. In *Phillips*, 524 U.S. at 172, this Court held "that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal."

Here, like in *Webb's Fabulous Pharmacies*, Petitioners made cash deposits held temporarily by the state. Petitioners' deposits earned interest in the Los Angeles County TK7 Trust Fund after exoneration of the cash bail. In addition, like *Webb's Fabulous Pharmacies* where the interest actually earned on the cash was kept by the circuit court, the interest here was transferred to the Los Angeles County General Fund for general fiscal purposes. In *Webb's Fabulous Pharmacies*, the state statute declared the interest to be "income of the office of the clerk," *id.* at 449 U.S.

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[4] The Legislature may impose a reasonable user fee for costs reasonably related to handling and returning cash bail, *see Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 163, but the California Legislature has not chosen to do so. *See infra* Section III.

156 note 1; in this case, the Court of Appeal determined the interest was owned by the County since the bail statutes contained an implied contract that did not expressly require the interest be paid to the depositor. *Overland v. Clarke*, Pet. App. 8.[5]

Moreover, contrary to the holding of the California Court of Appeal, established lower federal precedent makes clear that the unavailability of a contract remedy does not automatically preclude a Fifth Amendment Takings claim. Lower federal precedent holds that a viable breach of contract claim precludes a Takings claim. But the converse has never been held true, until the decision of the Court of Appeal here. *See System Fuels, Inc. v. United States*, 65 Fed.Cl. 163, 172-73 (2005) ("It is appropriate to proceed with both claims until the contract claim reaches fruition. Only after the contract claim has been fully litigated will it be possible to determine if the contract claim is viable"; valid contract claim "trumps" the Takings claim); *Sinclair v. United States*, 49 Fed.Cl. 274, 280 n. 7 (2001) ("Plaintiff's takings theory need be addressed only if he fails on his contract claim."). If there is no valid contract claim, the viability of a Takings claim depends instead on the origin of the right sought to be enforced. It is only where the duty breached by the government is created solely by the contract that the only remedy

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[5] Nor did the Court of Appeal explain why it rejected the equally logical conclusion that the absence of anything in the statute about interest meant that the post-exoneration interest was owned by the principal depositor, rather than Respondents.

is contractual. *See Boston Edison Co. v. United States*, 64 Fed.Cl. 167, 187 (2005) (no summary judgment because triable issue of fact as to whether rights taken by government "derive from" contract and are unavailable under contract); *Maine Yankee Atomic Power v. United States*, 225 F.3d 1336, 1342-1343 (Fed. Cir. 2000) (permitting plaintiff to maintain takings claim, since it "did not arise under the contract"); *Commonwealth Edison Co. v. United States*, 56 Fed.Cl. 652, 656 (2003) ("rights existing independently of a contract are not generally restricted to contractual remedies."); *Integrated Logistics Support Sys. Int'l, Inc. v. United States*, 42 Fed.Cl. 30, 34-35 (1998) (Takings claim not dismissed because court could not conclude whether contract conferred the rights at issue). Here the post-exoneration interest *res* has its origin in the "interest follows principal" rule that has existed for approximately 300 years, independent of any implied contractual rights between depositor and the state. *See Phillips*, 524 U.S. at 165. Accordingly, contrary to the rule established by the Court of Appeal below, the unavailability of a state contract remedy cannot preclude the existence of a constitutional Taking of interest claim.

Just as in *Webb's Fabulous Pharmacies*, *Brown* and *Phillips*, the principal amount of the cash deposit after exoneration is the property of the depositor. Indeed, none of the parties herein, including Respondents, have ever claimed that Respondents were not required to return the cash deposit principal to the original depositor. Because "interest follows principal," the earned interest on the cash deposit principal

belongs to the depositor, regardless of the reason given by the lower court to confiscate the private property of the depositor for public use.[6]

II. THE CALIFORNIA COURT OF APPEAL'S DECISION IS DIRECTLY IN CONFLICT WITH THIS COURT'S DECISIONS AS WELL AS THOSE OF LOWER FEDERAL COURTS.

The presence or absence of statutory authority directing the retention of interest earned on funds deposited with a governmental entity does not determine the constitutionality of the retention. *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 162. The state "by *ipse dixit* may not transform private property into public property without compensation." *Id.* at 164. This prohibition applies regardless of how the state

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[6] Because these proceedings result from a grant of summary judgment, there is no occasion for the Court to decide whether compensation in some amount is due. After the threshold issue – whether private property was taken – is finally decided, the trial court must decide if any compensation must be paid. *Phillips*, 524 U.S. at 173. The amount of just compensation due on interest taken by the state is determined by the plaintiff's net loss, calculated by subtracting the amount of interest accrued from the costs of administering the principal. *Arthur v. Dist. of Columbia*, 857 A.2d 473, 492 (D.C. Cir. 2004); *Schneider v. California Dep't of Corrections*, 345 F.3d 716, 720-721 (9th Cir. 2003); *McIntyre v. Bayer*, 339 F.3d 1097, 1101 (9th Cir. 2003); *see also Butler v. Michigan State Disbursement Unit*, 275 Mich.App. 309, 738 N.W.2d 269 (2007); *Canel v. Topinka*, 342 Ill.App.3d 65, 76, 276 Ill.Dec. 86, 793 N.E.2d 845 (2003).

acts, whether by judicial decrees or legislation. *Id.* In *Schneider v. California Dep't of Corrections*, 151 F.3d 1194 (9th Cir. 1998), for example, the Ninth Circuit held that a state law requiring the interest actually earned on inmate trust funds to be paid to the Department of Corrections does not insulate the state from an unconstitutional taking. *Schneider* quoted the "*ipse dixit*" language from *Webb's Fabulous Pharmacies*, and concluded the state is not protected from Fifth Amendment liability because a statute expressly appropriates the interest:

> [I]n *Phillips*, [the Court] refused to accord the Texas IOLTA rules – which purported to divest clients of ownership of the interest income in IOLTA accounts – any talismanic significance. Rather, the Court reiterated that 'a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law.' The *Webb's* and *Phillips* decisions are therefore similar to one another (and germane to this case) in a critical respect: In both cases, the Court relied, in the face of a contrary state statute, upon the traditional common law rule that 'interest follows principal' in recognizing a protected property interest in earned interest income.

Id. at 1200.[7]

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[7] Following remand, the Ninth Circuit reaffirmed that under *Brown*, "it is clear under [the] *per se* analysis that California's

(Continued on following page)

Here the case for the taking of Petitioners' property contrary to protections guaranteed by the Fifth Amendment is even stronger, since there was no statute that expressly appropriated the interest on cash bail deposits after exoneration.[8] Instead, the California Court of Appeal *implied* a right for the County and the Court Clerk to take the interest accrued after exoneration from its judicially created implied contract-like relationship that arose, before exoneration, from the California bail statutes. According to the Court of Appeal, "the cash bail deposit was in the nature of a contract between the depositor and the government," and "[t]he terms of the contract did not include a provision for interest on the deposit." *Overland v. Clarke*, Pet. App. 8. The California Court, in effect, substituted an implied contract-like relationship based on statute for the express statutory authorizations found ineffective to avoid Fifth Amendment liability in *Webb's Fabulous Pharmacies*, *Phillips* and *Schneider*. If a state statute cannot expressly convert private property into public property, neither can a judicial opinion purporting to create an implied statutory term to the same effect. Regardless of the method used by the state to appropriate the

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scheme perpetuates a taking because it appropriates the interest earned by the ITA's and allocates them for public use." *Schneider v. California Dep't of Corrections*, 345 F.3d 716, 720 (9th Cir. 2003).

[8] The argument for an unconstitutional taking is also stronger since there is no constitutional right to an interpleader deposit here, whereas there is a constitutional right to bail.

interest earned on the cash deposit, interest is still the private property of the depositor taken for a public use which requires compensation to its owner.

The California Court's finding of an implied waiver of the constitutional right to compensation from the taking of the accrued interest is also contrary to this Court's established waiver precedent. There can be no waiver of a constitutional right absent "an intentional relinquishment or abandonment of a known right or privilege." *United States v. Olano,* 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 308 U.S. 458, 464 (1938). "[C]ourts indulge every reasonable presumption against waiver" of fundamental constitutional rights. *College Sav. Bank v. Florida Prepaid Secondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999); *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937). *See Ohio Bell Telephone Co. v. Public Util. Comm'n of Ohio,* 301 U.S. 292, 307 (1937) ("We do not presume acquiescence in the loss of fundamental rights."). An effective waiver of a constitutional right must be made knowingly, intelligently and voluntarily. *D.H. Overmyer Co., Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 185 (1972).

The implied bail deposit contract-like relationship found by the California Court does not provide average depositors with specific notice that they are forfeiting their constitutionally protected property right in the interest earned on their deposit before exoneration. The implied contract certainly does not provide a depositor with such notice for the interest

earned after exoneration when the bail contract ends. Moreover, prior opinions of this Court and lower federal courts finding unconstitutional takings involved a state's decision to appropriate interest actually earned on cash deposits despite the depositor's knowledge that the state claimed it did not have to pay interest. The depositors in *Brown*, in *Webb's Fabulous Pharmacies*, in *Schneider v. California Dep't of Corrections*, 345 F.3d 716, and in *McIntyre v. Bayer*, 339 F.3d 1097, all knew that the state claimed the interest actually earned by statute or rule. Yet none of these decisions found an implied waiver of the constitutional right to just compensation when private property was appropriated for public use. In this case, there is nothing in the record that demonstrates Petitioners' intentional relinquishment of their Fifth Amendment protection against the taking of their property without just compensation.

Furthermore, the California Court's analysis that there is no unconstitutional taking of interest because the initial deposit of the principal is "voluntary" is likewise fundamentally flawed. There can be no doubt that the retention of cash bail interest after exoneration cannot be justified on the basis of the voluntary deposit of the principal with the understanding that it will be returned once the defendant fulfills all bail conditions. The initial voluntary deposit of the principal does not constitute consent to the government's right to confiscate the interest earned thereon after later exoneration. On the contrary, the retention of

interest by the government is a *per se* taking contrary to the protections of the Fifth Amendment to the United States Constitution. *Phillips v. Washington Legal Foundation*, 524 U.S. 156; *Brown v. Legal Foundation of Washington*, 538 U.S. at 235. *McIntyre v. Bayer*, 339 F.3d 1097 (9th Cir. 2003) (same); *Canel v. Topinka*, 793 N.E.2d 845, 853 (Ill. App. Ct., 2003), *aff'd*, 206 Ill. 2d 311 (2004). *See also Anderson v. Spear*, 356 F.3d 651, 670 (6th Cir.), *cert. denied*, 125 S.Ct. 453 (2004); *Arthur v. District of Columbia*, 857 A.2d 473, 492 (D.C. Cir. 2004).

In all of these decisions the initial deposit of the principal was voluntary; in each, the taking of the interest (or dividends) was held to violate the Takings Clause. The voluntariness of the initial deposit is irrelevant to the subsequent involuntary taking of the interest thereon. As stated by the appellate court in *Arthur v. District of Columbia*, 857 A.2d at 492, n. 23:

> the District's argument that Mr. Arthur voluntarily deposited $14,450.00 in the court registry, and hence the takings clause does not apply, is unavailing. While Mr. Arthur voluntarily deposited the $14,450.00 . . . he did not by that action signal that the government had a right to take and use private funds resulting from the sale of private property, including interest thereon, in any way it deemed necessary or appropriate.

III. THE TAKING OF ALL INTEREST EARNED CANNOT BE CONSIDERED A REASONABLE FEE FOR SERVICES RENDERED.

Petitioners acknowledge that a state legislature may assess a reasonable user fee on cash bail deposits that is "reasonably related to the costs of using the courts." *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 163. But in California and likely elsewhere, such fees *only* can be imposed by statute. *See e.g.*, *Vance v. Barrett*, 345 F.3d 1083, 1089 (9th Cir. 2003) ("[w]ithout a statutory mandate, prison officials had no authority to confiscate inmates' property"). To impose a fee without statutory authority would violate Petitioners' rights to due process. *Id.* at 1090-1091 ([w]ithout underlying authority and competent procedural protections, NDOP could not have constitutionally confiscated the net accrued interest."). *See Quick v. Jones*, 754 F.2d 1521, 1523 (9th Cir. 1985) (administrative agency has no right without underlying statutory authority to enforce forfeitures of property; "when it does so, it violates the due process clause.").

Moreover, a user fee must bear a reasonable relationship to the "costs of administering the . . . cash bail program." *Buckland v. County of Montgomery*, 812 F.2d 146, 148 (3d Cir. 1987). *See Phillips*, 524 U.S. at 171; *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989) (user fee must be a "fair approximation of the cost of benefits supplied"). Here, Respondents cannot justify a user fee equal to 100% of the interest actually earned after exoneration, an exaction that has no rational relationship between any identifiable

costs and the interest actually earned. The interest actually earned depends on the amount of cash deposited, the rate of interest and the length of time the cash remained in the possession of Respondents after exoneration of the bail. There is no showing in the record that the cost of returning the cash bail deposits (or to calculate the interest actually earned on the cash deposit) after exoneration is any greater for the Overland deposit of $500,000, than it is for a cash deposit for an alleged traffic violator who posted a relatively small amount of cash.

In any event, the California Legislature has not authorized any user fee.[9] The Legislature may enact a reasonable user fee in the future for prospective cash bail depositors. But the taking of the depositor's entire accrued interest without just compensation as an implied user fee offends the Fifth Amendment.

CONCLUSION

For approximately 300 years, common law principles have recognized that "interest follows principal." This Court has repeatedly stated that interest earned on a principal deposit is the private property

[9] Michigan appears to assess a user fee for cash bail deposits, a flat fee of $10. *See* Mich. Comp. Laws § 765.12a (2005). Michigan also directs that any "interest accumulating upon such fund [where cash is deposited] shall be paid into the general fund or corresponding fund of the state, county, city, village or township." Mich. Comp. Laws § 765.17 (2005).

of the depositor. When the State appropriates the interest actually earned on the deposited principal, the Fifth Amendment is implicated. This action by the State is a *per se* confiscation that requires the trial court to determine what compensation, if any, is due to the owner. The California Court of Appeal's implied contract-like theory, under which the depositor impliedly agreed to forego interest earned on bail deposits earned after exoneration because there is nothing in the cash bail statutes that directs the interest must be returned to the depositor, disregards established precedent of this Court as well as the decisions of lower federal courts. Furthermore, the failure of the California Legislature to explicitly require payments of that interest does not relieve the judiciary of its constitutional obligation to ensure that just compensation be paid. In light of the widespread national practice of taking interest earned after exoneration of cash bail deposits and given the large amounts of interest actually being taken nationwide on a daily basis, the petition for a writ of certiorari should be granted to decide this important Fifth Amendment issue that conflicts with relevant decisions of this Court.

Respectfully submitted,

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

MARK E. OVERLAND et al., Plaintiffs and Appellants, v. JOHN A. CLARKE, as Executive Officer and Clerk, etc., et al., Defendants and Respondents.	B193743 (Los Angeles County Super. Ct. No. BC302996) (Filed Sept. 27, 2007)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald L. Bauer, Judge.* Affirmed.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Overland Borenstein Scheper & Lim, Mark A. Borenstein for Plaintiffs and Appellants.

Morrison & Foerster, David F. McDowell and Sylvia Rivera for Defendants and Respondents Superior Court of California, County of Los Angeles, and John A. Clarke, Executive Officer and Clerk of the Superior Court of California, County of Los Angeles.

Manning & Marder, Kass, Ellrod, Ramirez, Patrick L. Hurley and Sylvia E. Havens for Defendants and Respondents J. Tyler McCauley and County of Los Angeles.

Plaintiffs and appellants Mark E. Overland (Overland), Overland & Borenstein LLP (O & B) and Pamela Poloski (Poloski) (collectively, plaintiffs) appeal a judgment following a grant of summary judgment in favor of defendants and respondents Superior Court for the County of Los Angeles, John A. Clarke, the court's executive officer and clerk (the court defendants) as well as the County of Los Angeles and J. Tyler McCauley, the county's auditor-controller (the county defendants) (collectively, defendants).

The issue presented is whether defendants' refusal to pay the plaintiffs post-exoneration interest on their cash bail deposits constitutes a taking of private property for which plaintiffs are entitled to just compensation.

The obligation herein is contractual and is defined by statute as well as by the language of the

contract. The statutory scheme does not provide for exoneration and refund of the bail deposit to occur simultaneously. (Pen. Code, § 1297 [deposit to be returned within 10 days after depositor submits claim].)[1] Unreasonable delay in returning the bail deposit conceivably could give rise to a contract claim. However, delay in returning the bail deposit does not amount to an unconstitutional taking. Therefore, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Background.*

On September 1, 2000, attorney Overland posted cash bail with the Los Angeles County Sheriff's Department in the amount of $500,000 by way of a cashier's check to secure the release of his client, Abdul Aziz Mohd Alkhelaifi in *People v. Alkhelaifi* (Super. Ct. L.A. County, No. BA206456).[2] Overland

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

[2] The statutory scheme in the Penal Code "provides various alternatives for posting bail. A defendant may be released from custody upon (1) execution of a bail bond or undertaking of bail by an admitted surety insurer ([ ] § 1276); (2) deposit by the defendant or any other person of cash in the amount of the bail (§§ 1295, 1296); (3) deposit by the defendant or any other person of bonds of the United States or State of California 'of the face value of the cash deposit required' (§ 1298); or (4) provision by the defendant or any other person of equity in real property equal to twice the amount of the cash deposit required (§ 1298)." (*Overland v. Superior Court* (2005) 126 Cal.App.4th 131, 141 (*Overland I*).

did not use his own money for the cash bail deposit but he was the depositor. The sheriff transferred the $500,000 to the superior court clerk, who deposited the bail money with the county's auditor-controller into the Los Angeles County TK7 Trust Fund on September 21, 2000.[3] On June 19, 2001, the $500,000 bail was exonerated by court order. A check dated July 26, 2001 was issued to Overland in the amount of $500,000; the envelope containing the check was postmarked August 3, 2001. No interest was included with the refund payment. Overland made two requests to the superior court's accounting division for interest on the deposit. No interest was paid to him.

Pamela Poloski deposited cash bail on December 20, 2002, in the amount of $35,000 by way of cashier's check to secure the presence of Robert Poloski in *People v. Robert Alan Poloski* (Super. Ct. L.A. County, No. PA042651). The procedures followed in the *Alkhelaifi* case also were used in the *Poloski* action. On February 10, 2003, the $35,000 bail was exonerated. Poloski did not receive the $35,000 back until about March 25, 2003. No interest was included with the refund payment.

O & B is a law firm which, on July 12, 2003, deposited cash bail in the amount of $250,000 by way

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[3] Money deposited into the TK7 Trust Fund earns interest which is deposited into the Los Angeles County general fund for general fiscal purposes. For the period January 1, 2000 to December 31, 2002, the fund held in the TK7 Trust Fund earned a rate of return between 2.45 and 6.38 percent.

of a cashier's check to secure the appearance of Leonard McSherry in *People v. Leonard James McSherry* (Super. Ct. L.A. County, No. 3BH00547-01). The money belonged to McSherry. The $250,000 bail was exonerated on July 25, 2003. The cash bail was returned to O & B on September 5, 2003, without interest.

2. *Pleadings.*

On September 26, 2003, the three plaintiffs filed the instant action for "unlawful taking without compensation; unjust enrichment; injunctive relief; declaratory relief and petition for writ of mandate to compel payment of interest."

The complaint's first cause of action pled an "unlawful taking of property without compensation against all defendants-interest earned between deposit and exoneration."

The second cause of action alleged an "unlawful taking of property without compensation against all defendants-interest earned between exoneration and return."

Additionally, the complaint pled a cause of action for unjust enrichment, and requested injunctive and declaratory relief, as well as a writ of mandate directing defendants to pay interest on cash bail deposits.

The complaint also requested private attorney general fees pursuant to Code of Civil Procedure section 1021.5.

3. *Trial court sustained demurrer without leave to amend as to first cause of action for pre-exoneration interest; in Overland I we upheld that ruling.*

The court defendants filed a motion for judgment on the pleadings or, in the alternative, demurrers to all claims asserted against them in the complaint. The matter was heard in the Orange County Superior Court. On March 17, 2004, the trial court overruled the demurrer to the second cause of action (relating to post-exoneration interest), and otherwise sustained the demurrers without leave to amend. With regard to the first cause of action, for *pre-exoneration* interest, the trial court ruled *Fresno Fire Fighters v. Jernagan* (1986) 177 Cal.App.3d 403 (*Fresno*) controlled and precluded an award of interest. As to the second cause of action, for post-exoneration interest on bail, the trial court determined the *Fresno* case did not control.[4]

Plaintiffs thereafter brought a petition for writ of mandate, seeking review of the trial court's order sustaining the demurrer to their first cause of action without leave to amend. Plaintiffs contended that in light of the United States Supreme Court's decisions in *Phillips v. Washington Legal Foundation* (1998) 524 U.S. 156 [141 L.Ed.2d 174] (*Phillips*) and *Brown*

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[4] Plaintiffs and the county defendants subsequently stipulated the trial court's March 17, 2004 order on the demurrers interposed by the court defendants "will be deemed applicable" to the county defendants.

v. Legal Foundation of Wash. (2003) 538 U.S. 216 [155 L.Ed.2d 376] (*Brown*), the Court of Appeal's decision in *Fresno, supra,* 177 Cal.App.3d 403, was no longer good law, and their first cause of action stated a claim for an unconstitutional taking of pre-exoneration interest without just compensation. We issued an order to show cause.

In *Overland I,* we denied the petition for writ of mandate, ruling the defendants' retention of pre-exoneration interest did not amount to a taking. We held plaintiffs' reliance "upon *Phillips* and *Brown* is misplaced. Those cases involved the involuntary taking by the government of private property, i.e., interest earned on client funds deposited in IOLTA accounts, for public use, namely, to fund legal services for low income individuals. Those circumstances implicate the Fifth Amendment, which requires the payment of just compensation when private property is taken for public use. However, those constitutional concerns are absent here. [¶] The court defendants' refusal to pay petitioners interest on their cash bail deposits does not constitute a 'taking' because there was no confiscation of private property by the court defendants for a public purpose, or at all. Rather, when [plaintiffs] voluntarily deposited cash bail to free the criminal defendants from custody, [plaintiffs] entered into contracts with the government by which [plaintiffs] guaranteed the appearance of the criminal defendants released on bail at all required court proceedings." (*Overland I, supra,* 126 Cal.App.4th at p. 140.)

Thus, the taking principles implicated in interest on lawyers trust account (IOLTA) cases were inapplicable – the cash bail deposit is in the nature of a contract between the depositor and the government. (*Overland I, supra,* 126 Cal.App.4th at p. 140.) The contractual obligation "is defined by statute as well as by the language of the contract. [Citation.]" (*Id.* at p. 141.) The terms of the contract do not include a provision for interest on the deposit. (*Id.* at p. 140.) Further, the statutory scheme governing bail, section 1268 et seq., does not require the payment of interest on cash bail deposits and the Legislature has made no provision therefor. (*Overland, supra,* at p. 141.)

In sum, "the quid pro quo for the cash bail deposits which were posted herein was the release of the criminal defendants from custody. The contracts did not include a provision that [plaintiffs] would earn interest on the cash bail deposits." (*Overland I, supra,* 126 Cal.App.4th at p. 142.) Therefore, we concluded plaintiffs were incapable of stating a cause of action for denial of pre-exoneration interest on their cash bail deposits and denied plaintiffs' petition for writ of mandate. (*Ibid.*)[5]

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[5] In *Overland I,* we also addressed the *Fresno* decision, on which the trial court had relied in ruling on the demurrer. *Fresno* held a county's retention of interest accrued on cash bail deposits in criminal proceedings is not an unconstitutional taking of private property. (*Fresno, supra,* 177 Cal.App.3d at p. 413.) The *Fresno* court reasoned that bail money is deposited for a public purpose, namely, securing a defendant's appearance,

(Continued on following page)

Following the issuance of *Overland I,* the California Supreme Court denied plaintiffs' petition for review and the United States Supreme Court denied a petition for writ of certiorari.

4. *Subsequent proceedings.*

Following the resolution of *Overland I,* which involved *pre-exoneration* interest, plaintiffs filed a motion for summary judgment or summary adjudication with respect to their cause of action for post-exoneration interest. Plaintiffs contended the bail contracts terminated upon exoneration, when the trial court ordered return of the cash bail. However, the money was not immediately returned to plaintiffs. Forty five days elapsed between the date of exoneration and the date the bail was returned to Overland, and 42 days elapsed as to Poloski and O & B, during which time interest continued to accrue on the deposits. Plaintiffs argued defendants' retention

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and the interest earned thereon is reasonably needed to support the court system. (*Id.* at p. 412.)

We concluded that with respect to pre-exoneration interest, *Fresno's* rejection of a claimed right to interest on cash bail in criminal proceedings was correct in result. However, we disagreed with *Fresno's* rationale. The reason there is no right to pre-exoneration interest on cash bail is not that the money was deposited for a public purpose. Rather, no interest is owed because the bail deposit is made in accordance with the terms of a particular contract and the terms of that contract do not include a provision for pre-exoneration interest. (*Overland, I, supra,* 126 Cal.App.4th at p. 142.)

of the interest earned on the deposits after exoneration amounts to a taking of property for general county purposes, entitling them to just compensation.

The county defendants filed a competing motion for summary judgment/summary adjudication. The court defendants also filed a motion for summary judgment, or in the alternative, for judgment on the pleadings. Defendants' papers contended plaintiffs lacked standing because they did not use their own money to post bail; plaintiffs were collaterally estopped from seeking post-exoneration interest; the return of the bail deposits within a matter of weeks was reasonable as a matter of law; and there was no "taking" to implicate the Fifth Amendment.

On May 15, 2006, the matter came on for hearing. The trial court denied plaintiffs' motion and granted defendants' motions and ordered entry of judgment in favor of defendants.[6]

In ruling on the matter, the trial court stated: "[t]he claims presented for the takings assertion, some constitutional deprivation, don't survive the *Overland* [*I*] analysis that I've read in that appellate opinion. Whether it be before exoneration or after exoneration, the question about the constitutional rights here I think has been resolved. This contract

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[6] It is unclear from the record whether the trial court granted judgment on the pleadings or summary judgment in favor of defendants. The trial court merely ordered "entry of judgment."

necessarily requires that it run its course through the reasonable opportunity to return the bail. [¶] . . . [T]hat can't be an instantaneous event. . . . [¶] . . . I think that's an unreasonable interpretation of the circumstances. The contract has to be read as running through completion, and through completion of the purpose of this voluntary contract includes the time necessary for a careful and reasoned and proper return of the money. It can't be done instantaneously. Everyone has acknowledged that that's the case. [¶] And therefore I think that the contract that is described in the *Overland* case is still in play, it's a voluntary undertaking by the bailor who recognizes that he or she had alternatives and they're all described in that case and chose this one. And that contact [sic] does not provide, by its terms, for any interest to the benefit of the bailor. And I think that's the result that follows here, just as well as it followed in the first version of this case."

Plaintiffs filed a timely notice of appeal from the judgment.

CONTENTIONS

Plaintiffs contend the trial court erred in granting defendants' motion for summary judgment and in denying plaintiffs' competing motion because defendants' retention of interest earned after the trial court exonerates bail constitutes an unconstitutional taking. Plaintiffs seek a remand to the trial court to determine damages due them.

Defendants contend plaintiffs lack standing, plaintiffs are collaterally estopped from seeking post-exoneration interest, the county is not a proper defendant, and the retention of post-exoneration interest did not constitute a taking.

DISCUSSION

1. *Plaintiffs had standing to sue.*

Defendants' theory is that plaintiffs lack standing because they merely showed they deposited the cash, but did not establish they *owned* the money. The contention lacks merit.

Section 1297 provides: "*When money has been deposited, a receipt shall be issued in the name of the depositor.* If the money remains on deposit at the time of a judgment for the payment of a fine, the clerk shall, under the direction of the court, if the defendant be the depositor, apply the money in satisfaction thereof, and after satisfying restitution to the victim or the Restitution Fund, fines, and costs, shall refund the surplus, if any, to the defendant. *If the person to whom the receipt for the deposit was issued was not the defendant, the deposit after judgment shall be returned to that person. . . .*" (Italics added.)

We conclude plaintiffs' undisputed status as depositors is sufficient to confer standing.

2. *No merit to defendants' collateral estoppel argument; Overland I did not involve the issue of post-exoneration interest.*

"Collateral estoppel precludes a party from relitigating in a second proceeding the matters litigated and determined in a prior proceeding. The requirements for invoking collateral estoppel are the following: (1) *the issue necessarily decided in the previous proceeding is identical to the one that is sought to be relitigated;* (2) the previous proceeding terminated with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party to or in privity with a party in the previous proceeding. [Citation.]" (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1201, fn. 1, italics added.)

As set forth above, *Overland I* solely involved the trial court's ruling on the first cause of action for *pre-exoneration* interest. The issue of post-exoneration interest was not before us in that writ proceeding and we did not purport to address that issue. (*Overland I, supra,* 126 Cal.App.4th at p. 142, fn. 8.) Therefore, we reject defendants' collateral estoppel argument.

We now turn to the merits of the appeal.

3. *The obligation herein is contractual; delay in returning the bail deposit does not give rise to a taking claim.*

As explained in *Overland I,* the cash bail deposit is in the nature of a contract between the depositor

and the government. (*Overland I, supra,* 126 Cal.App.4th at p. 140.) Plaintiffs assert that be that as it may, the contract terminates at the moment the trial court exonerates bail. The argument is unpersuasive. Pursuant to the statutory framework governing cash bail, the court defendants were contractually obligated to return the cash bail deposit only *after* exoneration.

The contractual obligation herein "is defined by statute as well as by the language of the contract. [Citation.]" (*Overland I, supra,* 126 Cal.App.4th at p. 141.) Section 1297 provides in relevant part: "If the person to whom the receipt for the deposit was issued was not the defendant, *the deposit after judgment shall be returned to that person within 10 days after the person claims it by submitting the receipt,* and, if a claim is not made within 10 days of the exoneration of bail, the clerk shall immediately notify the depositor of the exoneration of bail." (Italics added.)

Therefore, we reject plaintiffs' contention the contract requires exoneration of bail and return of the deposit to be simultaneous. Unreasonable delay in returning the bail deposit conceivably could give rise to a contract claim.[7] However, delay in returning the bail deposit does not constitute a taking.

---

[7] That issue is addressed in the next section of the opinion.

4. *Plaintiffs have waived their argument that the delay in refunding the bail money constitutes a breach of contract.*

On remand following *Overland I,* plaintiffs contended they were entitled to *post-exoneration* interest (second cause of action) to compensate them for the 42 or 45 day interval between exoneration by the court and refund of the monies. The proceedings on remand involved plaintiffs' theory the denial of post-exoneration interest amounted to an unconstitutional taking. Plaintiffs did not plead or argue that delay in refunding the bail money constituted a breach of contract for which they were entitled to damages.

The proceedings on remand were as follows:

The plaintiffs filed a motion for summary judgment or in the alternative, for summary adjudication, contending that as a matter of law, the undisputed facts established that defendants had taken plaintiffs' property, namely, the post-exoneration interest earned on the cash bail deposits, without just compensation.

The County defendants filed a competing motion for summary judgment or in the alternative, for summary adjudication.

The Court defendants also filed a motion for summary judgment or in the alternative, for judgment on the pleadings, contending plaintiffs had not alleged facts sufficient to state a takings claim and

any delay in returning the money did not support a taking claim.

In ruling on the matter, the trial court found no requirement that the money be restored instantaneously, it rejected the taking claim and granted summary judgment or judgment on the pleadings for defendants.

On appeal, plaintiffs continued to adhere exclusively to their taking theory. For example, the appellants' reply brief states at page three: "Appellants have never sought contract damages for the delay in returning the cash principal." Similarly, page six thereof asserts "the right to the interest actually earned post exoneration is not dependent on any contractual rights under the bail contract identified in *Overland I,* but rather is governed by the Takings Clause of the Fifth Amendment and the due process clause of the Fourteenth Amendment."

At the time of oral argument, the issue of contract damages was raised by this court on its own motion and this court requested supplemental briefing on the issue. However, we now conclude it is inappropriate at this juncture to inject the contract theory into this case.

It is well settled that on summary judgment, the issues are "framed by the pleadings since it is these allegations to which the motion must respond by establishing a complete defense or otherwise showing there is no factual basis for relief on any theory reasonably contemplated by the opponent's pleading."

(*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064.)

Here, until the filing of their supplemental brief on appeal, plaintiffs have expressly eschewed a contract theory and have proceeded exclusively on their theory that denial of post-exoneration interest amounts to an unconstitutional taking. Given the state of the pleadings, the defendants were not required to negate a breach of contract claim in order to be entitled to summary judgment.

Had the plaintiffs properly raised their breach of contract claim in the trial court, defendants could have asserted any applicable contract defenses in moving for summary judgment. According to defendants, those defenses would have included: failure to file a government claim; statute of limitations; delay resulting from failure of plaintiffs to submit a proper receipt; Gov. Code section 12440 (warrant shall not be drawn unless authorized by law and unless specific appropriation available to meet it); and lack of privity.

Admittedly, plaintiffs might have pled a viable claim for breach of contract based on defendants' delay in refunding the bail money after exoneration. However, it is too late to change the theory of the case at this late stage. It would be unfair to the defendants to reverse the grant of summary judgment in order to afford the plaintiffs to relitigate this matter as a contract action, especially because plaintiffs have expressly eschewed a contract claim until now.

Therefore, the contract claim is waived by plaintiffs' failure to raise it earlier.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P.J.

We concur:

CROSKEY, J.

ALDRICH, J.

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

MARK E. OVERLAND; PAMELA POLOSKI, and OVERLAND & BORENSTEIN LLP, for themselves and for all persons and entities similarly situated, Plaintiffs, v. THE COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF THE COUNTY OF LOS	Case No. BC302996 [Complex Civil, Hon. Ronald L. Bauer, Judge of the Orange County Superior court, sitting by designation] **[PROPOSED] JUDGMENT IN FAVOR OF JOHN A. CLARKE, THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, J. TYLER McCAULEY, AND THE COUNTY OF LOS ANGELES**

ANGELES; J. TYLER MCCAULEY, Auditor-Controller for the County of Los Angeles, in his individual and official capacities; SUPERIOR COURT OF CALIFORNIA FOR LOS ANGELES COUNTY; JOHN A. CLARKE, Executive Officer/Clerk of the Los Angeles County Superior Court, in his individual and official capacities Defendants.	(Filed Jun. 23, 2006)

On May 15, 2006, Defendants John A. Clarke and the Superior court of California, County of Los Angeles' Motion for Judgment on the Pleadings or, In the Alternative, Summary Judgment, and J. Tyler McCauley and The County of Los Angeles' Motion for Summary Judgment came on for hearing, the Honorable Ronald L. Bauer presiding. All parties appeared through counsel of record. For the reasons stated in the motions and at the hearing, and good cause showing, this Court granted the motions and ordered entry of judgment as requested.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that judgment is hereby entered in favor of John A. Clarke, the Superior Court of California, County of Los Angeles, J. Tyler McCauley, and

the County of Los Angeles on each of Plaintiffs' claims. Plaintiffs shall take nothing. John A. Clarke, the Superior Court of California, County of Los Angeles, J. Tyler McCauley, and the County of Los Angeles shall have costs in the amount of $_____ from Plaintiff's Mark E. Overland, Pamela Poloski, and Overland & Borenstein LLP.

Dated: June 23, 2006

RONALD L. BAUER
Hon. Ronald L. Bauer
Judge of the Orange
County Superior Court,
sitting by designation

Court of Appeal, Second Appellate District,
Division Three – No. B175442
S132137

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MARK E. OVERLAND et al., Petitioners,

v.

LOS ANGELES COUNTY SUPERIOR COURT,
Respondent;

COUNTY OF LOS ANGELES et al.,
Real Parties in Interest.

(Filed May 11, 2005)

Petition for review DENIED.

GEORGE
Chief Justice

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

October 11, 2005

Mr. Mark A Borenstein
Overland Borenstein Schepet & Kim LLP
300 South Grand Avenue
Suite 2750
Los Angeles, CA 90071

Re: Mark E. Overland, et al.
v. Los Angeles County, California, et al.
No. 05-194.

Dear Mr. Borenstein:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

MARK E. OVERLAND et al., Plaintiffs and Appellants, v. JOHN A. CLARKE, as Executive Officer and Clerk, etc., et al., Defendants and Respondents.	B193743 (Los Angeles County Super. Ct. No. BC302996) ORDER DENYING REHEARING (Filed Oct. 16, 2007)

THE COURT:

The petition for rehearing contends this court erred in concluding that appellants waived a breach of contract theory. However, as noted in the opinion, the appellants' reply brief stated in no uncertain terms: "*Appellants have never sought contract damages for the delay in returning the cash principal.*" (Italics added.)[1] Appellants prosecuted this appeal solely on the theory that defendants' retention of post-exoneration interest amounted to an unconstitutional taking.

[1] The petition for rehearing, in a footnote, characterizes this statement in the reply brief as "admittedly confusing."

Further, the issue of unjust enrichment was belatedly raised in the reply brief. (*Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361.)

Appellants cannot continue to enlarge the issues on appeal in order to stave off summary judgment. The petition for rehearing is denied.

Court of Appeal, Second Appellate District,
Div. 3 – No. B193743
S158020

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MARK E. OVERLAND, et al.,
Plaintiffs and Appellants,

v.

JOHN A. CLARKE, as Executive Officer, etc., et al.,
Defendants and Respondents.

(Filed Dec. 12, 2007)

The petition for review is denied.

GEORGE
Chief Justice

Cal. Penal Code section 1297

When money has been deposited, a receipt shall be issued in the name of the depositor. If the money remains on deposit at the time of a judgment for the payment of a fine, the clerk shall, under the direction of the court, if the defendant be the depositor, apply the money in satisfaction thereof, and after satisfying restitution to the victim or the Restitution Fund, fines, and costs, shall refund the surplus, if any, to the defendant. If the person to whom the receipt for the deposit was issued was not the defendant, the deposit after judgment shall be returned to that person within 10 days after the person claims it by submitting the receipt, and, if a claim is not made within 10 days of the exoneration of bail, the clerk shall immediately notify the depositor of the exoneration of bail.

Cal. Penal Code section 1298

In lieu of a deposit of money, the defendant or any other person may deposit bonds of the United States or of the State of California of the face value of the cash deposit required, and these bonds shall be treated in the same manner as a deposit of money or the defendant or any other person may give as security any equity in real property which he or she owns, provided that no charge is made to the defendant or any other person for the giving as security of any equity in real property. A hearing, at which witnesses may be called or examined, shall be held before the

magistrate to determine the value of the equity and if the magistrate finds that the value of the equity is equal to twice the amount of the cash deposit required he or she shall allow the bail. The clerk shall, under order of the court, when occasion arises therefor, sell the bonds or the equity and apply the proceeds of the sale in the manner that a deposit of cash may be required to be applied.

The county treasurer shall, upon request of the judge, keep the deposit and return it to the clerk on order of the judge.

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SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MARK E. OVERLAND; PAMELA POLOSKI; and OVERLAND & BORENSTEIN LLP, for themselves and for all persons and entities similarly situated, Plaintiffs, vs. THE COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; J. TYLER McCAULEY, Auditor-Controller for the County of Los Angeles, in his individual and official capacities; SUPERIOR COURT OF	) Case No. BC 302996)) **Assigned to the Honorable Ronald L. Bauer**)) **NOTICE OF APPEAL; ELECTION TO PROCEED BY APPENDIX IN LIEU OF CLERK'S TRANSCRIPT (Cal. R. Ct. R. 5.1); DESIGNATION OF REPORTER'S TRANSCRIPT (Cal. R. Ct. R. 4(a))**)) (Filed Aug. 28, 2006))) Complaint Filed:) September 26, 2003

CALIFORNIA FOR LOS ANGELES COUNTY; JOHN A. CLARKE, Executive Officer/Clerk of the Los Angeles County Superior Court, in his individual and official capacities; and DOES 1 through 25, inclusive,

Defendants.

TO ALL INTERESTED PARTIES AND TO THEIR ATTORNEYS OF RECORD AND TO THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that Plaintiff/Petitioner MARK E. OVERLAND, PAMELA POLOSKI AND OVERLAND & BORENSTEIN LLP (collectively, "Plaintiffs") hereby appeal to the California Court of Appeal for the Second Appellate District from the order granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment (the "Order") entered by the Honorable Ronald L. Bauer, Judge of the Orange County Superior Court on June 23, 2006. A copy of the Order is attached hereto as Exhibit 1.

Election to Proceed by Rule 5.1

NOTICE IS ALSO GIVEN that Plaintiffs elect to proceed by Appendix in lieu of Clerk's Transcript under Rule 5.1 of the California Rules of Court.

Designation of Reporter's Transcript

NOTICE IS ALSO GIVEN that Plaintiffs designate the following transcripts for inclusion in the reporter's transcript in accordance with Rule 4(a):

1. All oral proceedings heard on the Motions for Summary Judgment, held on May 15, 2006 in Department CX103 of the Orange County Superior Court, the Honorable Ronald L. Bauer presiding and reported by Jennifer L. Scott, CSR #9218.

The Fee Waiver of Reporter Jennifer Scott for the above-designated transcript is attached hereto as Exhibit 2 in lieu of a deposit in accordance with Rule 4(b)(3) of the California Rules of Court.

Dated: August 28, 2006

OVERLAND BORENSTEIN
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By: /s/ Kristin Knox Esche
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SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

MARK E. OVERLAND; PAMELA POLOSKI; and OVERLAND & BORENSTEIN LLP, for themselves and for all persons and entities similarly situated,

Plaintiffs,

v.

THE COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; J. TYLER McCAULEY, Auditor-Controller

Case No. BC302996

[Complex Civil, Hon. Ronald L. Bauer, Judge of the Orange County Superior Court, sitting by designation]

NOTICE OF ENTRY OF JUDGMENT

for the County of Los Angeles, in his individual and official capacities; SUPERIOR COURT OF CALIFORNIA FOR LOS ANGELES COUNTY; JOHN A. CLARKE, Executive Officer/Clerk of the Los Angeles County Superior Court, in his individual and official capacities; and DOES 1 through 25, inclusive,

Defendants.

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that on June 23, 2006 the Court in the above-entitled action entered Judgment in favor of Johan A. Clark, The Superior Court of California, County of Los Angeles, J. Tyler McCauley, and the County of Los Angeles. A copy of the judgment is attached hereto as Exhibit A.

Dated: June 29, 2006

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By: /s/ Michael J. Bostrom
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10

(3)

No. 07-1165

Supreme Court, U.S.
FILED
AUG 11 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MARK E. OVERLAND, PAMELA POLOSKI,
OVERLAND & BORENSTEIN LLP,

Petitioners,

v.

COUNTY OF LOS ANGELES AND
SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondents.

**On Petition For A Writ Of Certiorari
To The Court Of Appeal
Of The State Of California**

BRIEF IN OPPOSITION FOR RESPONDENTS COUNTY OF LOS ANGELES AND SUPERIOR COURT OF LOS ANGELES COUNTY

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AUGUST 11, 2008

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether petitioners' lawsuit alleging a violation of the federal Takings Clause involves a justiciable case or controversy under Article III and its related prudential doctrines.

2. Whether petitioners raise a substantial federal question sufficient to support this Court's jurisdiction when their takings claim is brought against an arm of the State and its agent, neither of which is an appropriate defendant in a federal cause of action for an alleged constitutional violation and both of which are shielded by Eleventh Amendment immunity.

3. Whether the failure to remit to petitioners interest earned on money that was deposited pursuant to a contract with the State to secure the appearance of a criminal defendant, in lieu of other bail options, during the period after bail is exonerated, constitutes an unconstitutional taking, even though the terms of the parties' contract do not require payment of such interest.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the petition for a writ of *certiorari* and on the caption of this brief in opposition, two other parties were sued by petitioners in the state court: John A. Clarke, Executive Officer and Clerk of the Superior Court of California, County of Los Angeles, and J. Tyler McCauley, Auditor-Controller for the County of Los Angeles, in both their individual and official capacities.

Petitioners' failure to mention these additional parties in their *certiorari* petition constitutes a waiver of any claim for relief against them. *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 89 (1946).

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BRIEF IN OPPOSITION

This Court's review is not warranted of the unpublished decision of the California Court of Appeal in this case. Petitioners claim that the failure by respondent Superior Court and respondent County to remit to them post-exoneration interest on bail money that they voluntarily deposited to obtain the release of a criminal defendant, violates the federal constitutional Takings Clause. But petitioners do not have standing to pursue their claim in this Court and respondents have governmental immunities against such a suit. Even if this were an appropriate vehicle for resolution of the legal issues raised by petitioners, review is no more warranted here where petitioners' claim involves a post-exoneration interest claim than it was when this Court denied review of petitioners' petition involving a pre-exoneration interest claim. *See Overland v. Superior Court,* 126 Cal. App. 4th 131 (2005), *rev. denied*, 2005 Cal. LEXIS 5065 (Cal. May 11, 2005), *cert. denied*, 546 U.S. 937 (2005).

STATEMENT

1. Statutory Framework

California has a comprehensive statutory scheme governing bail for criminal defendants arrested for violating state law. If a criminal defendant is eligible for bail, and he seeks release from custody pending disposition of his criminal charges, California provides four alternatives for posting bail.

First, a defendant may be released from custody upon the execution of a bail bond or the undertaking of bail by an admitted surety insurer. Cal. Penal Code §§ 1269, 1276(a). The surety guarantees to pay a fixed sum if the defendant fails to appear as required. *See People v. Amwest Sur. Ins. Co.*, 105 Cal. App. 3d 51, 54 (1980). Posting bail in this manner often involves a bail bondsman who acts as the surety's agent in negotiating with the defendant (or a person acting on defendant's behalf) and subsequently issues the bond. A professional surety typically charges a nonrefundable fee of 10 percent of the amount of the bail bond and, in addition to the fee, will usually require the posting of collateral (cash, a deed, or other property) to protect the surety. 1 *California Criminal Defense Practice* § 12.06[2] (Matthew Bender & Co. 2008). A bail bond may be posted with the clerk of the court or with the county sheriff at the jail where the defendant is being held in exchange for the defendant's release from custody. Cal. Penal Code § 1269b(a) & (g).

Second, in lieu of a bail bond, a defendant or other person may do as petitioners did in this case and deposit, in cash, the sum of money indicated in the order admitting defendant to bail or set forth in the court's fixed bail schedule. Cal. Penal Code §§ 1295(a), 1296. Cash for bail may be posted with the clerk of the court or with the county sheriff at the jail in exchange for the criminal defendant's discharge from custody. Cal. Penal Code § 1269b(a) & (g). The cash deposit scheme further provides that, "[w]hen money has been deposited, a receipt shall be

issued in the name of the depositor." Cal. Penal Code § 1297. If the depositor is the defendant, the government may, at the time of a judgment, apply the cash deposit to satisfy any fines, victim restitution, or costs owed by the defendant. *Ibid.* If, however, the person to whom the depositor receipt was issued was someone other than the defendant, the government cannot use the cash deposit to satisfy such obligations of the defendant. Rather, in that case:

> the deposit after judgment shall be returned to [the depositor] within 10 days after the person claims it by submitting the receipt, and, if a claim is not made within 10 days of the exoneration of bail, the clerk shall immediately notify the depositor of the exoneration of bail.

Ibid.

A cash deposit posted for bail with a county sheriff is transmitted to the judge or the clerk of the court. Cal. Penal Code § 1269b(g). The court must then transfer deposits to the county treasurer, where they are held pending an order from the court directing withdrawal or payment. Cal. Gov't Code § 68084(a)-(b). If the defendant fails to appear as required at court proceedings, the "money deposited instead of bail is forfeited." Cal. Penal Code § 1307. The statutory scheme does not expressly provide for payment of interest.

Third, again in lieu of a bail bond, a defendant or other person may deposit bonds of the United States or the State of California with a face value of

the cash deposit required and those bonds "shall be treated in the same manner as a deposit of money." Cal. Penal Code § 1298. If it becomes necessary, the clerk of the court upon order of the court may sell the bonds and "apply the proceeds of the sale in the manner that a deposit of cash may be required to be applied." *Ibid.*

Fourth, again in lieu of a bail bond, a defendant or other person may give to the court as security "any equity in real property which he or she owns," if a magistrate determines the value "is equal to twice the value of the cash deposit required." *Ibid.* When bail is posted in this manner, the property owner must execute a deed of trust in favor of the county, subjecting the property to a lien, but the owner continues to possess the property during the period of encumbrance. *See* Education Div. of the Administrative Office of the Courts, *California Judges Benchguides: Bail and Own-Recognizance Release* § 55.27, at p. 55-21 (2007); *Zolezzi v. Michelis*, 195 P.2d 835, 837 (Cal. Ct. App. 1948). If it becomes necessary, the clerk of the court upon order of the court may sell the equity and "apply the proceeds of the sale in the manner that a deposit of cash may be required to be applied." Cal. Penal Code § 1298.

2. Factual And Procedural Background

a. Petitioners, a law firm, one of its partners, and one of its employees, used the cash deposit for bail procedure discussed above and, on three separate

occasions, deposited cash with the Los Angeles County Sheriff's Department to secure the appearance of a criminal defendant (a different defendant on each occasion).

On September 1, 2000, petitioner Mark Overland deposited $500,000 with the Los Angeles County Sheriff's Department by way of a cashier's check to secure the release of a legal client in connection with a criminal action pending in the Superior Court of California, County of Los Angeles. Pet. App. 3. The county sheriff transferred the deposit to the court clerk, who deposited it with the county treasurer. Pet. App. 4. Petitioner Overland "did not use his own money for the cash bail deposit but he was the depositor." *Ibid.* The court exonerated the bail on June 19, 2001, and a check dated July 26, 2001 was issued to Overland in the amount of $500,000. *Ibid.* Overland requested interest on the deposit from the court's accounting division. No interest was paid to the depositor. *Ibid.*

On December 20, 2002, petitioner Pamela Poloski deposited $35,000 with the Los Angeles County Sheriff's Department by way of a cashier's check to secure the release of a criminal defendant in connection with a criminal action pending in the Superior Court of California, County of Los Angeles. *Ibid.*; C.A.E.R. 169. Petitioners do not allege in the complaint that petitioner Poloski owned the cash that she deposited and there is no evidence in the record to that effect. The court exonerated the bail on February 10, 2003, and a check was issued to

petitioner Poloski in the amount of $35,000 and received on March 13, 2003. No interest was paid to the depositor. Pet. App. 4.

On July 12, 2003, petitioner Overland & Borenstein LLP deposited $250,000 with the Los Angeles County Sheriff's Department by way of a cashier's check to secure the release of a criminal defendant in connection with a criminal action pending in the Superior Court of California, County of Los Angeles. Pet. App. 4-5; C.A.E.R. 169. Overland & Borenstein LLP did not own the money that it deposited; the money belonged to the criminal defendant. Pet. App. 5. The court exonerated the bail on July 25, 2003, and the cash bail was returned to Overland & Borenstein LLP in the amount of $250,000 on September 5, 2003. No interest was paid to the depositor. *Ibid.*

Although the statute provides that the deposit shall be returned to the depositor "within 10 days after the person claims it by submitting the receipt," Cal. Penal Code § 1297, petitioners did not submit any receipts, C.A.E.R. 168-169; Pet. C.A. Reply Br. 18-19, and thus did not trigger the 10-day return requirement.

b. Petitioners brought suit against, *inter alia*, respondents Superior Court of California, County of Los Angeles and the County of Los Angeles in California state court on September 26, 2003. Petitioners identified their claims as (1) a taking

without just compensation of the interest earned on the cash bail deposits pre-exoneration (*i.e.*, between the date of deposit and the date bail was exonerated), in violation of the federal and state constitutional takings clauses, citing the Fifth and Fourteenth Amendments of the federal Constitution and Sections 7 and 19 of Article I of the California Constitution; (2) a taking without just compensation of the interest earned on the cash bail deposits post-exoneration (*i.e.*, between the date bail was exonerated and the date the deposit was returned to petitioners), also in violation of the federal and state takings clauses; and (3) an unjust enrichment claim, against only the respondent County. C.A.E.R. 7-10. Petitioners sought money damages and declaratory and injunctive relief. C.A.E.R. 14-15.

On a demurrer by the respondent Superior Court, the trial court dismissed petitioners' pre-exoneration takings claim against all defendants, Pet. App. 6 & n.4, but did not dismiss petitioners' post-exoneration takings claim. *Ibid.* The claim of unjust enrichment was not challenged by the demurrer.

c. Petitioners sought interlocutory review of the dismissal of their pre-exoneration claims, and the California Court of Appeal ruled against petitioners on the merits. Pet. App. 6-8. The court held that petitioners' reliance on *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), and *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) was "misplaced" because "[t]hose cases involved the involuntary taking by the government of private

property, i.e., interest earned on client funds deposited in IOLTA accounts, for public use" which implicated the Fifth Amendment requirement to pay just compensation "when private property is taken for public use." Pet. App. 7 (quoting *Overland v. Superior Court*, 126 Cal. App. 4th 131, 140 (2005), *rev. denied*, 2005 Cal. LEXIS 5065 (Cal. May 11, 2005), *cert. denied*, 546 U.S. 937 (2005)). The court of appeal explained that "those constitutional concerns are absent" in the instant case because "there was no confiscation of private property by the court defendants for a public purpose, or at all." *Ibid.* The court emphasized that here petitioners "voluntarily deposited cash bail to free the criminal defendants from custody" and by doing so "entered into contracts with the government by which [they] guaranteed the appearance of the criminal defendants released on bail at all required court proceedings." *Ibid.* The court looked to the terms of the contract and the governing statute which defined the contractual obligations and concluded that the contract did not require payment of interest on cash bail deposits. Pet. App. 8 (citing *Overland*, 126 Cal. App. 4th at 140-141). "[T]he quid pro quo for the cash bail deposits which were posted herein was the release of the criminal defendants from custody." Pet. App. 8 (quoting *Overland*, 126 Cal. App. 4th at 142).

The California Supreme Court denied petitioners' petition for review of this denial of their pre-exoneration claims, Pet. App. 22, and this Court denied

petitioners' petition for writ of *certiorari* on that ruling as well. Pet. App. 23.

d. Back in the trial court, the parties filed cross-motions for summary judgment on petitioners' remaining post-exoneration takings claims, Pet. App. 9-10, and unjust enrichment claim, C.A.E.R. 149. The trial court denied petitioners' motion, granted respondents' motions, and entered judgment in respondents' favor. Pet. App. 10.

e. The California Court of Appeal affirmed. Pet. App. 1-18. The court of appeal concluded, as an initial matter, that petitioners' failure to show that they owned the money that they deposited with respondents did not deny them standing. The court summarily concluded that the state law requiring that the deposit be returned to the depositor was sufficient to confer standing. Pet. App. 12.

On the merits, the court of appeal rejected petitioners' post-exoneration takings claims for the same reason the court had rejected their pre-exoneration takings claims on the earlier appeal from the demurrer. The court reaffirmed that "the cash bail deposit is in the nature of a contract between the depositor and the government," and it concluded that the contract did not terminate at exoneration because respondents were "contractually obligated to return the cash bail deposit only *after* exoneration." Pet. App. 13-14. The court noted that although "unreasonable delay" in return of the bail deposit

"conceivably could give rise to a contract claim," it "does not constitute a taking." Pet. App. 14.

The court of appeal raised the issue of contract damages on its own at the time of oral argument and requested supplemental briefing. Pet. App. 16. The court ultimately ruled that petitioners waived any contract claims. Pet. App. 15-18. Petitioners "did not plead or argue" in the trial court "that delay in refunding the bail money constituted a breach of contract for which they were entitled to damages," and on appeal they "continued to adhere exclusively to their taking theory." Pet. App. 15-16. The court concluded that it was "inappropriate at this juncture to inject the contract theory into this case," Pet. App. 16, because "until the filing of their supplemental brief on appeal, plaintiffs have expressly eschewed a contract theory," Pet. App. 17, and "it would be unfair to [respondents] to reverse the grant of summary judgment in order to afford [petitioners the opportunity] to relitigate this matter as a contract action." *Ibid.*

The court of appeal denied rehearing, and in that order the court reaffirmed its ruling that petitioners waived any contract claims and noted that petitioners had belatedly attempted to revive their unjust enrichment claim only in their reply brief on appeal. Pet. App. 24-25.

The Supreme Court of California denied review. Pet. App. 26.

REASONS THE PETITION SHOULD BE DENIED

I. This is not an appropriate vehicle to address petitioners' claim because there are threshold jurisdictional obstacles that would prevent the Court from reaching the merits.

A. Petitioners lack standing to pursue their claim in federal court because they have not established that they have a personal stake in the interest they claim was unconstitutionally taken. They did not own the money that they deposited and, therefore, even if the owner of the money had a federal right to interest that was earned after the money was deposited to obtain release of a criminal defendant (which we maintain an owner does not), petitioners do not have any such right. Therefore, petitioners do not meet the requirements of Article III and its related prudential doctrines.

B. Also, petitioners have not raised a substantial federal question because they cannot obtain a remedy from respondent Superior Court who is an arm of the State and respondent County who served as its agent. Respondents fall outside the scope of permissible defendants under 42 U.S.C. § 1983, and are constitutionally immune from suit under the Eleventh Amendment.

II. Even if this case were free of jurisdictional obstacles, review would not be merited because the ruling below is correct and there is no disagreement in the lower courts on the issue.

A. The California Court of Appeal correctly ruled that no unconstitutional taking occurred. It held that when a criminal defendant in California chooses as an option to have cash deposited to obtain his release from custody pending disposition of criminal charges (instead of having a surety post a bail bond, or having government bonds deposited, or having equity in real property given as security), the depositor of the cash enters into a contract with the State. The state statutes and regulations describe the terms of the contract, including under what circumstances the deposited money will be forfeited to the State (for failure to appear, for example) and when it will be returned to the depositor. This contract does not require payment of interest to the depositor.

B. The federal takings precedent cited by petitioners has nothing to do with such a voluntary agreement. The cases on which petitioners attempt to rely involved situations where either the State required that certain cash or assets be deposited or invested in a particular manner and the interest used to further a purpose selected by the State, or the State essentially compelled a citizen to deposit money with the State by making such a monetary deposit the sole means of obtaining a benefit that only the government could provide.

Moreover, petitioners assert that all 50 States follow the same practice of not paying interest on cash posted for bail. But petitioners point to no

contrary case law holding such a practice violates the Takings Clause.

For all these reasons, the petition should be denied.

I. THRESHOLD JURISDICTIONAL OBSTACLES WOULD PREVENT A RULING ON THE MERITS IN THIS CASE, MAKING IT AN INAPPROPRIATE VEHICLE TO ADDRESS PETITIONERS' TAKINGS CLAIM

A. Petitioners Lack Article III Standing Because They Did Not Own The Money On Which The Interest They Now Seek Was Earned

1. Petitioners attempt to invoke this Court's *certiorari* jurisdiction to review an unpublished ruling from a state court on their claim that respondents violated the Takings Clause of the Fifth Amendment (as incorporated by the Fourteenth Amendment). Because petitioners seek now to invoke the jurisdiction of a federal court, they bear the burden of demonstrating that they have Article III standing. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 623 n.2 (1989) (reaffirming holding of *Doremus v. Board of Education*, 342 U.S. 429 (1952), that plaintiffs who file suit in state court, but would have lacked standing to bring suit in federal district court, lack standing to obtain a writ of *certiorari* from this Court to review an adverse state court decision).

Federal standing law requires that a party experience injury-in-fact and generally "must assert

his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalksi v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). That requirement means that petitioners do not have standing to obtain review in federal court because they did not experience injury and are not asserting their own legal rights and interests inasmuch as they did not own the money deposited as bail. Pet. App. 4-5.[1] Even if the owner of the money had a constitutional right to any interest that may have been earned after the money was deposited to obtain release of a criminal defendant (which we maintain an owner does not), petitioners, as non-owners of the money, do not have any such right.

The fact that the cash deposit is returned to the depositor does not alter this fact. The statute that provides for such return to the depositor after exoneration, Cal. Penal Code § 1297, does not provide for any payment of interest to either the depositor or

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[1] As set forth on pages 5-6, *supra*, the undisputed evidence on the summary judgment motions before the lower courts demonstrated that petitioners Overland and Overland & Borenstein LLP did not own the money they deposited as bail, and the record is bereft of any evidence that petitioner Poloski owned the money she deposited as bail. Indeed, even petitioners' complaint does not allege that petitioners owned the money deposited, C.A.E.R. 2-4, but in any event, because the trial court resolved this matter on summary judgment, petitioners cannot rely on the pleadings and must submit admissible evidence to establish standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

the owner of the cash deposit. The requirement that the cash deposit be returned to the person who deposited it does not by itself give that person a right in any interest earned on the cash deposit. (This is so even if the owner of the cash had such a right in any interest, which he does not for the reasons discussed in Part II, *infra*).

2. This standing doctrine of the Court that does not allow litigants to invoke the injuries or rights of others is based on the presumption that "the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation." *Kowalksi*, 543 U.S. at 129. The Court's exception to this rule that would allow a party to invoke in litigation the rights of another, requires that the litigant show that it "has a 'close' relationship with the person who possesses the right," and that "there is a 'hindrance' to the possessor's ability to protect his own interests." *Id.* at 130 (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). Petitioners do not meet that standard.

There is no suggestion, much less evidence in the record, that petitioners have a close relationship with the owners of the deposited money. Indeed, in two of the instances, the record does not identify the owner of the cash deposit. In the third instance, the owner is the criminal defendant who was released on bail and the depositor was the petitioner law firm. There is nothing in the record, however, that demonstrates the relationship between the defendant and the law firm.

Even if that defendant were a law firm client, the relationship between a law firm and a client would not meet the "closeness" requirement because the attorney-client relationship has no relation to the economic right claimed by petitioners. *Cf. Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) (a party has standing to challenge statute affecting its clients' rights only where "[t]he activity sought to be protected is at the heart of the business relationship between [the party] and its clients").

There also is no suggestion or evidence in the record that there was any "hindrance" that prevented the persons who owned the cash deposits from bringing suit to attempt to argue an entitlement to interest earned, if they were so inclined.

3. The rule against allowing litigants to invoke the rights of third parties should be enforced with particular vigor in cases, such as this, when the remedy sought is payment of money. There is nothing in the record to show that petitioners have any legally binding arrangement with the people who owned the money regarding the disposition of any interest that petitioners might recover in this litigation. If petitioners prevailed, they might keep the interest for themselves and the true owners could then also seek to sue the same respondents here for the same interest. *Cf. United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 554-555, 556 (1996) (absent instruction by Congress to contrary, an association lacks prudential

standing to bring damage actions on behalf of its members because of, *inter alia*, the "risk that the damages recovered by the association will fail to find their way into the pockets of the members on whose behalf injury is claimed"). There is no reason to countenance this risk of double recovery against respondents.

B. Respondent Superior Court Is An "Arm Of The State" And Respondent County Is Its Agent And They Thus Are Not "Persons" Subject To Suit Under Section 1983 And Are Immune From Such Suit Under The Eleventh Amendment

Petitioners' claim of a taking without just compensation does not raise a substantial federal question in the circumstances of this case because respondents are not susceptible to suit under 42 U.S.C. § 1983 and also are entitled to Eleventh Amendment immunity from suit.[2]

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[2] Petitioners' complaint failed to expressly identify the cause of action on which they relied to bring their federal constitutional takings claim, but the only conclusion can be that their claim is predicated on Section 1983. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709-710 (1999) (federal takings claims may be enforced through Section 1983). There is no California state law cause of action that authorizes a suit to obtain money for a violation of federal constitutional rights. *See Griffith v. Monterey County*, No. H032108, 2008 WL 2352489, at *6 (Cal. Ct. App. June 10, 2008) ("A litigant seeking

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1. a. Respondent Superior Court is a government entity that is an "arm of the State," inasmuch as it is part of the judicial branch of the State of California and exercises state authority. The California Supreme Court has explained that "[t]he superior courts of the state of California, while located and functioning in the several counties of the state, are not local or county courts, but constitute a system of state courts, being vested with and exercising the judicial power of the state under the express terms of section 1 of article VI of the state constitution." *Sacramento & San Joaquin Drainage Dist. v. Superior Court of the County of Colusa*, 196 Cal. 414, 432 (Cal. 1925); *see also United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 754 n.23 (1950) (a California Superior Court "is not a local court but a part of a system of state courts"); *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987) ("state case law and constitutional provisions make clear that the [Superior] Court is a State agency").

Respondent County would not generally constitute an arm of the State, but in the

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damages based on a violation of a [federal] constitutional right must rely on Title 42 United States Code section 1983."); *Klat v. Regents of Univ. of California San Diego*, No. D041793, 2003 WL 22963102, at *4 (Cal. Ct. App. Dec. 17, 2003) (Section 1983 "is the exclusive means for [plaintiff] to bring her claim against the [defendants] for asserted violations of her due process rights or any other constitutional rights."), *cert. denied*, 543 U.S. 918 (2004).

circumstances of this case, the respondent County is acting as an agent of the respondent Superior Court, as it argued below. *See* Resp. County C.A. Br. 16-19. That is because cash deposited with a superior court in California, such as cash deposits for bail, must be transferred to the county treasurer, where it is held pending an order from the court directing withdrawal or payment. Cal. Govt. Code § 68084(a)-(b). When a county takes possession of such deposits, "the county treasurer in handling the funds must look to the court for direction; the county treasurer is in effect the treasurer of the court, an *ex-officio* officer, and holds the money for the court, not for the county." *Metropolitan Water Dist. of Southern California v. Adams*, 32 Cal. 2d 620, 628 (1948); *see also City of Santa Clara v. County of Santa Clara*, 1 Cal. App. 3d 493, 497 (1969) (county officials are officers of the court when handling cash deposits made with the court); *Hart v. County of Alameda*, 76 Cal. App. 4th 766, 776-777 (1999) ("[a]lthough the county treasurer is a county employee who also has control over county funds, when the treasurer initially receives a jury deposit from the court to hold as a deposit, the treasurer is acting as an arm of the court").

Thus, as the agent for respondent Superior Court, respondent County is entitled to the same federal protections as respondent Superior Court itself. *See, e.g., Brotherton v. Cleveland*, 173 F.3d 552, 566 (6th Cir. 1999) (county officials are arms of the state where they act in compliance with state mandate); *Scott v. O'Grady*, 975 F.2d 366, 371 (7th

Cir. 1992) (same), *cert. denied*, 508 U.S. 942 (1993); *Echols v. Parker*, 909 F.2d 795, 801 (5th Cir. 1990) (same).

b. Because respondents are an arm of the State and its agent, they are not susceptible to suit under 42 U.S.C. § 1983. Section 1983 provides a cause of action against "every person" who acts under color of state law to deny another person their rights under federal law. A State and its arms are not appropriate defendants in a Section 1983 suit because they are not "persons" against whom the statute authorizes suit. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 & n.24 (1997); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Indeed, the Ninth Circuit has held that California superior courts are not "persons" subject to suit under Section 1983. *See Burgess v. Carmichael*, 37 Fed. Appx. 288, 292-293 (9th Cir. 2002), *cert. denied*, 537 U.S. 1125 (2003).

c. The fact that an arm of a State is not susceptible to suit as a defendant in an action under Section 1983 is so firmly foreclosed by past precedent that such a claim does not raise a "substantial federal question." *Cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993) (allegations that have been previously rejected by Supreme Court case law are so insubstantial as not to confer federal jurisdiction); *see also Consolidated Tpk. Co. v. Norfolk & O.V. Ry. Co.*, 228 U.S. 596, 599-600 (1913) (defining substantial federal question for purposes of Supreme Court's appellate jurisdiction).

This Court lacks jurisdiction over a case under the *certiorari* statute, 28 U.S.C. § 1257, in the absence of a "substantial federal question." *See, e.g., Sevier Comm'n Co. v. Wallowa Nat'l Bank*, 287 U.S. 575 (1932); *Spurrier v. Mitchell Irrigation Dist.*, 283 U.S. 796 (1931); *Hallam v. Grant*, 280 U.S. 522 (1929); *McPherson Bros. Co. v. Okanogan-Douglas Inter-County Bridge Co.*, 278 U.S. 571 (1928).

2. Respondents are immune from suit under the Eleventh Amendment.

The Eleventh Amendment grants an arm of a State, and thus its agent, immunity from being sued in private litigation in both state court and federal court. *See Alden v. Maine*, 527 U.S. 706 (1999). Section 1983 does not abrogate Eleventh Amendment immunity to suit. *See Quern v. Jordan*, 440 U.S. 332, 339-345 (1979); *Edelman v. Jordan*, 415 U.S. 651, 676-677 (1974).[3]

The Ninth Circuit has recognized that Section 1983 claims cannot be brought against a California superior court because of such immunity. *See, e.g., Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003) ("Plaintiff cannot state

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[3] The Eleventh Amendment is properly raised by respondents in this Court for the first time because it "sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised" in the lower courts. *Edelman*, 415 U.S. at 678 (citing *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 466-467 (1945)).

a claim against the Sacramento County Superior Court (or its employees), because such suits are barred by the Eleventh Amendment."). Because respondent County was acting as an agent of respondent Superior Court in this circumstance, it too cannot be held liable in such a suit. *Cf. Shands Teaching Hosp. & Clinics, Inc. v. Beech Street Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000) (private entity entitled to State's Eleventh Amendment immunity when it manages a program over which the State retains control and functions solely as "administrators acting at the behest of the State").[4]

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[4] Petitioners initially sued two government officials as well as respondents Superior Court and County but, as noted on page ii, *supra*, petitioners did not seek review in the *certiorari* petition of the lower court's entry of judgment in favor of these officials. This Court is thus precluded from determining their rights or liabilities. *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 89 (1946) (when certain parties in proceedings below "have not been named as respondents here," this Court is "precluded from making any determination concerning their rights or liabilities"). Indeed, it appears that petitioners never independently pursued claims against these officials during the course of the proceedings.

In any event, these officials, to the extent they are sued in their official capacities, are entitled to the same Eleventh Amendment immunity from damages as the government entity they serve. *See Will*, 491 U.S. at 71. The *Ex parte Young* exception to Eleventh Amendment immunity, which allows suits against state officials under Section 1983 for prospective injunctive and declaratory relief, *id.* at 71 n.10, is not applicable in this case because money, not an injunction or declaration, is the only appropriate remedy for an alleged taking without just compensation, *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986,

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II. REVIEW IS NOT WARRANTED BECAUSE THE CALIFORNIA COURT OF APPEAL WAS CORRECT THAT NO UNCONSTITUTIONAL TAKING OCCURRED AND THERE IS NO CONFLICT WITH PRECEDENT OF ANY OTHER COURT

Even apart from the profound jurisdictional problems inhering in this case that make it an improper vehicle for this Court's review, there is no reason to grant *certiorari*. The California Court of Appeal correctly ruled that this case is properly viewed as a contract between the depositor of the bail money and the government and that contract does not require payment of interest. Furthermore, petitioners did not take advantage of potentially available state court remedies, which are a necessary precursor to a federal Takings Claim. Finally, petitioners point to no other case involving the Takings Clause and bail and there is no conflict between the decision below and the decisions of this Court or any other court.

1016 (1984), and because petitioners have not established the likelihood that they themselves would experience the same injury in the future, a showing necessary for them to have standing to seek injunctive or declaratory relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 111 (1983).

A. The California Court Of Appeal Correctly Ruled That No Interest Payment Is Required Because Petitioners Voluntarily Chose A Cash Deposit In Lieu Of Other Options As The Means To Obtain Release Of A Criminal Defendant On Bail

1. California law provides several means by which to obtain the release of a criminal defendant pending disposition of criminal charges after the court sets bail. One of four methods may be used: posting of a bail bond; deposit of cash equal to the amount of bail (as petitioners did); deposit of government bonds of that amount; or provision of equity in real property that is valued at twice that of the cash deposit required. *See* pages 1-4, *supra*.

Each of the four means of obtaining release on bail has a different set of risks and rewards for the person posting bail or making the deposit of cash, bonds, or real property. For example, if a criminal defendant opts to post a bail bond, a professional surety, or "bail bondsman," will typically charge him or her a nonrefundable fee of 10 percent of the amount of the bond, and will usually require the defendant to post security in addition to the fee. 1 *California Criminal Defense Practice* § 12.06[2] (Matthew Bender & Co. 2008). Therefore, this option would be more costly to a criminal defendant than a cash deposit of his own funds. Moreover, the defendant has no right to earn any interest on

whatever security is given to the bail bondsman because that is a matter governed by private contract.

A choice to, instead, give as security an equity in real property imposes a much greater risk on the person giving the equity as security because he will experience a unique injury if the defendant fails to appear and the court orders the real property (usually a home) to be sold. Furthermore, that person's ability to sell or borrow against the real property would likely be impaired by the deed of trust until bail is exonerated. *See, e.g., Trustors Sec. Serv. v. Title Recon Tracking Serv.*, 49 Cal. App. 4th 592, 596 (1996) (explaining that liens on real property create problems for clearing title to the property, selling the property, and obtaining loans secured by the property); *Radian Guar., Inc. v. Garamendi*, 127 Cal. App. 4th 1280, 1289 (2005) ("the value of the property is diminished or impaired by outstanding lien encumbrances").

The fact that so many options are provided by state law to those deciding what to do in light of an order setting bond distinguishes this case from many of those cited by petitioners. In those cases, the State essentially compelled a citizen to deposit money with the State by making such a monetary deposit the sole means of obtaining a benefit that only the government could provide. *See* Pet. 14, 19-20, 22, 23 (discussing cases) and pages 30-31, *infra*.

Petitioners' choice in this case to make a cash deposit to obtain release of the various criminal defendants on bail benefited them in certain ways. They gained the benefit of not working through a bail bondsman, for example, and thus did not pay any up-front fee and did not need to provide security apart from the cash itself. They also gained the benefit of not having to put at risk equity in real property of twice the value of the cash deposit.

The court of appeal was correct to view this choice to post bail pursuant to the terms set forth in the statute for cash deposits as a contract between the depositor and the State. The state statutes and regulations describe the terms of the agreement, including under what circumstances, and when, the money deposited will be forfeited to the State (for failure of the criminal defendant to appear, for example) or returned to the depositor and they form an implied contract in law. And the court of appeal was correct that this contract does not require the payment of interest to the depositor.

2. This does not mean, however, that state law necessarily offers petitioners no potential avenue of relief for allegations of undue delay in returning cash deposits. As the court of appeal correctly noted, such delay "conceivably could give rise to a contract claim" but it "does not constitute a taking." Pet. App. 14. State law requires that the cash deposit be returned to the depositor within 10 days after "the person claims it by submitting the receipt" he received when he deposited the money. Cal. Penal Code § 1297.

Petitioners, however, did not submit their bail receipts, and thus did not trigger the 10-day return requirement embodied in that statute.

In any event, the Takings Clause would not require compensation for conduct that is not authorized by state law because that constitutional provision is concerned with the official actions of the government that amount to a condemnation of property, not the conduct of individual government officials. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984); *Hooe v. United States*, 218 U.S. 322, 335-336 (1910). Compensating for any such conduct is solely the role of tort or contract law. *See United States v. North Am. Transp. & Trading Co.*, 253 U.S. 330, 333-334 (1920); *Ribas y Hijo v. United States*, 194 U.S. 315, 323 (1904); *cf. Brown v. Legal Foundation of Washington*, 538 U.S. 216, 239 (2003) (if lawyer, in violation of state law, deposits money that could earn interest in an account where interest went to a third party at the direction of State, remedy for failure to earn interest is a state contract or tort action against lawyer, not a takings claim against the State).[5]

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[5] This substantive rule that unauthorized government conduct cannot constitute a taking parallels the ripeness requirement of the Takings Clause that a person who seeks just compensation for a taking under federal law must seek compensation in state court through all available state procedures before the federal takings claim is ripe. *See Williamson County Reg. Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). This is because the right

(Continued on following page)

B. The Ruling Of The Court Of Appeal Does Not Conflict With Precedent Of This Court Or Of Lower Courts

Petitioners argue that the decision below directly conflicts with a variety of court decisions, but those cases had nothing to do with bail and are plainly inapt.

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protected by the Takings Clause is the right to just compensation from the State, not the right to be free from a taking. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999); *Eastern Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment).

In their reply brief and supplemental submission to the state appellate court, petitioners identified two state law claims that, they asserted, would provide them relief by giving them all (or virtually all) the post-exoneration interest earned on the bail money that they deposited: a state equitable claim of unjust enrichment (which they contended would entitle them to all the interest earned) and a state breach of implied contract (which they contended would entitle them to statutory interest for any unauthorized delay in returning the money). Pet. C.A. Reply Br. 21-22; Pet. C.A. Supp. Ltr. Br. 3, 5-6. Petitioners now describe these remedies as "unavailable," Pet. 16, 17, but the reason that these state remedies are not available to them in this action is because they abandoned the unjust enrichment claim by not raising it until their reply brief in the court of appeal (contrary to state law procedures) and waived the state contract claim by expressly disavowing a contract claim in that court. Pet. App. 16-17, 24-25. The court of appeal so held and also noted that these claims might have been viable if properly raised. Pet. App. 17. Petitioners' abandonment and waiver of colorable state claims did not meet their obligation to seek just compensation through existing state procedures, and thus their takings claim is also unripe. This ripeness issue can be raised and considered in this Court even though not pressed or passed on below. *See Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993).

1. Petitioners rely primarily (Pet. i, 9-10, 12, 13, 14-15, 22, 23) on *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), and *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), but those cases involved unilateral government regulation of private conduct. The decisions addressed a government regulatory scheme that required lawyers to deposit certain client funds into an interest-bearing account, and then diverted the interest earned in that account to further a purpose selected by the State, *i.e.*, to foundations that financed legal services for low-income individuals. The lawyers and clients had no choice in the matter. The State thus was regulating how private parties had to act with certain funds and unilaterally appropriated for its own purposes interest accrued on those funds.

Four of the five lower court takings cases cited by petitioners (Pet. 14, 22, 23) likewise involved unilateral government action against private property. *See Canel v. Topinka*, 793 N.E.2d 845, 853 (Ill. App. Ct. 2003) (Takings Clause required payment of stock dividends when state law transferred to the State itself custody in stocks believed to be abandoned but later claimed by owner); *Arthur v. District of Columbia*, 857 A.2d 473, 477 & n.7, 491 (D.C. 2004) (Takings Clause required payment of interest when court ordered litigant to make monthly payments to court while litigation over property was being resolved and, subsequently, court-ordered payments and proceeds of sale of property were transferred from court to the Treasurer of the District

of Columbia on the grounds they were abandoned when parties failed to prosecute litigation); *McIntyre v. Bayer*, 339 F.3d 1097, 1098 (9th Cir. 2003) (Takings Clause required payment of interest when State required prison inmate to keep his money, including money received from outside prison, in state account); *Anderson v. Spear*, 356 F.3d 651, 669-670 (6th Cir.) (Takings Clause violated when state law transferred to State itself the funds remaining in a candidate's campaign account after an election), *cert. denied*, 543 U.S. 956 (2004).

By contrast, in this instance, petitioners voluntarily deposited the cash with respondents as a means to obtain the release of a criminal defendant. This voluntary conduct is not, as petitioners suggest (Pet. 21), relevant only to the question whether petitioners waived a constitutional right. It is relevant because a private party voluntarily giving money to the government is in a different position than a private party who has no choice but to give the government what it demands. *See Berkman v. United States*, 250 U.S. 114, 118 (1919) ("[o]bviously" criminal defendants' "property was not taken for public use" when "[w]ith full knowledge they voluntarily asked to deposit money with the clerk, and later requested that he be required to pay it out.").

2. The other Takings Clause cases on which petitioners rely are inapposite because in those cases a private person was required to deposit funds with

the government as the sole means to obtain a government benefit.

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), a person deposited certain funds with a court because such a deposit was "required by state statute" in order for a party "to avail itself of statutory protection from claims of creditors and others." *Id.* at 164. In such a situation, the Takings Clause required payment of the interest earned on the mandated deposit. Similarly, the only other lower court case on which petitioners rely (Pet. 14, 19-20, 22, 23) held that the Takings Clause required the payment of interest earned on deposits by prison inmates who had no choice but to deposit money in a government account if they wanted to purchase items from the prison canteen, which was the exclusive permissible source for obtaining items for use in the prison. *See Schneider v. California Dep't of Corrections*, 345 F.3d 716, 718 (9th Cir. 2003).

These cases are not relevant here because, as noted above, petitioners had a range of options for obtaining the release of a criminal defendant, including obtaining a bail bond through a bondsman (which would have charged a fee and perhaps security), or giving as security an equity interest in real property (which would have posed a risk of the depositor's home or other real property being sold).

Petitioners point to no case other than the instant case that addresses a takings challenge to recover interest earned on a cash deposit for bail.

This is particularly significant because petitioners state that they believe that no State remits to cash depositors the interest earned post-exoneration on bail money. Pet. 4-5. Petitioners' failure to identify any other court that has addressed this issue, much less one that has reached a different conclusion from the state courts below, strongly weighs against this Court's review of this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

MARK E. OVERLAND, PAMELA POLOSKI,
OVERLAND & BORENSTEIN LLP,

Petitioners,

v.

COUNTY OF LOS ANGELES and
SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California

REPLY TO OPPOSITION TO PETITION

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INTRODUCTION

The Petition for Writ of Certiorari raises a substantial question concerning Respondents' practice of confiscating interest actually earned[1] on cash bail deposits after exoneration of bail by the court. The practice likely impacts most, if not all of the states and involves substantial amounts of accrued interest. None of the arguments in the Opposition to the Petition for Writ of Certiorari ("Opposition") has merit or bars review by this Court. Instead, Respondents' conduct is a compelling example of a *per se* taking of property, used by the state for what may be a laudable purpose, but in circumstances where the social benefit of general fiscal relief is improperly borne by a minority composed of cash bail depositors. The Petition should be granted.

I. PETITIONERS DO NOT LACK ARTICLE III STANDING.

California law vests the depositor – and only the depositor – with the right to the return of the cash bail deposit. Respondents' claim that Petitioners "are not asserting their own legal rights [since]. . . . they

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[1] The parties stipulated below that cash bail deposits are transferred by the Court to the County and deposited into a interest earning trust account. After exoneration, the principal is returned to the depositor. The interest is kept by the County for general fiscal purposes. *See* JOINT LIST OF STIPULATED FACTS, ¶¶ 3,8,10,12,14 & 19, filed in the Superior Court on or about March 20, 2006.

did not own the money deposited as bail." Opposition, 14, was properly rejected by the California court. *See* Pet. App. 12 (Petitioners' "undisputed status as depositors is sufficient to confer standing.").

Under California law, only the depositor of cash bail has the right to have the cash deposit returned upon termination of the criminal proceedings. Cal. Pen. Code §1297.[2] That statutory command is sufficient to confer standing on Respondents for any accrued interest since in California, and nearly every other state, the right to accrued interest follows the right to the principal. *Pomona City School Dist. v. Payne*, 9 Cal. App. 2d 510, 512 (1935) ("interest is an accretion or increment to the principal fund earning it, and unless lawfully separated therefrom becomes a part thereof.") Petitioners therefore have advanced a sufficient injury in fact, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (Article III standing is met by actual injury caused by the conduct of the defendant), since the Fifth Amendment claim is based on Respondents' confiscation of their

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[2] California Penal Code §1297 provides in part: "If the person to whom the receipt for the deposit was issued was not the defendant, the deposit after judgment shall be returned to that person. . . ." *See* Cal. Pen. Code §§1188 (refund of deposit to "the person or persons found by the court to have deposited said money on behalf of said defendant."); and 1302 (clerk must return bail deposit to original depositor upon surrender of defendant). Respondents stipulated below that they were authorized "to return any cash bail deposit . . . only to the original depositor." JOINT LIST OF STIPULATED FACTS, ¶ 18.

state-created property interest. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) ("[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ."). *See Hudson v. Police Court of City of Oakland*, 39 Cal. App. 149, 150 (1918) (where cash bail is deposited by a third party, cash cannot be used to pay a fine imposed upon the defendant; court must direct its return to the depositor); Cal. Pen. Code §1297 (deduction for fines and penalties from cash bail only if deposited by defendant, but not from bail deposited by third party); Cal. Pen. Code §§1305-1308 (ownership of the cash transfers to the state only if statutory forfeiture procedures are followed).

Respondents contend that because these statutes do not provide for payment of interest to either the owner or the depositor, Petitioners have no standing in this Court. Opposition, 14-15. This curious argument would completely insulate Respondents' confiscation of the interest on bail deposits from constitutional challenge (or any challenge at all) by anyone, since the owner, if different from the depositor, has no right to the deposit under the California cash bail statutes.[3]

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[3] It is inconceivable Respondents are actually advocating a rule that would either allow or mandate someone other than the statutory depositor to obtain a cash bail refund. That rule would open the floodgates to unlimited third party claims and

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Nor is Petitioners standing defeated because they are the depositors and have not alleged "ownership" of the cash deposits. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 158, the Petitioner was the court appointed receiver, who had the right to marshal assets, but was not the "owner" of the accrued interest. The receiver had sufficient standing for this Court to declare a Takings Clause violation, even though the receiver merely sought the accrued interest for unidentified third parties, who perhaps were the "owners."

Likewise, in *Fresno Fire Fighter Local 753 v. Jernagan*, 177 Cal. App. 3d 403 (1986), the only other California decision concerning cash bail and other court deposits, the status as an "owner" was irrelevant; the depositor had standing. There, Plaintiff sought and obtained the interest earned on a preliminary injunction bond deposit under a statute that again authorized return of the bond to the depositor. There was no inquiry as to the source of the cash used for the bond since, for purposes of which entity was entitled to the accrued interest, only the depositor had standing.

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essentially make the County and the Superior Court the arbiter of actual and beneficial claims under the state's property laws. The California Legislature crafted a better solution to avoid placing the Respondents in that very position by specifying that only the original *depositor* is entitled to return of the bail, thereby avoiding any third party dispute over the actual ownership of the bail refund.

Accordingly, Petitioners have Article III standing; they have "alleged such a personal stake in the outcome of the controversy as to warrant [] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [their] behalf. *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975) (*citing Baker v. Carr*, 369 U.S. 186, 204 (1962)).[4]

II. SECTION 1983 AND ELEVENTH AMENDMENT IMMUNITY DO NOT BAR REVIEW.

A. Petitioners Do Not Claim Damages Under 42 U.S.C. §1983.

Respondents claim for the first time after protracted proceedings in the state courts, that, as agents of the state, they "are not susceptible to suit under 42 U.S.C. §1983." Opposition, 17. But Petitioners do not claim compensation pursuant to section

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[4] Article III standing mirrors California law relating to standing. *See Holmes v. California Nat. Guard*, 90 Cal. App. 4th 297, 314-315 (2001) ("standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication because he or she has either suffered or is about to suffer an injury"). Respondents also argue that because Petitioners never provided the bail receipt referred to in section 1297, they lack standing. On the contrary, Respondents stipulated below that the superior court clerk independently initiates the refund process "within 5 days after exoneration," and "[s]ince June 6, 1999, the original or a copy of the Bail/Fine Receipt issued with the cash bail deposit was not required in order to obtain a return of cash bail after the bail was exonerated." *See* JOINT LIST OF STIPULATED FACTS, ¶¶ 16 & 17.

1983. Rather, their claims are based on the "self-executing" Fifth Amendment right to compensation for the taking of the interest earned on their cash bail deposits. *See United States v. Clarke*, 445 U.S. 253, 257 (1980).[5]

"[G]overnment action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'" *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (*citing Armstrong v. United States*, 364 U.S. 40, 49 (1960)). This Court has consistently recognized that a claim for just compensation for governmental taking is not based on statute, but is inherent in the constitutional protection provided by the Fifth Amendment. *First English Evangelical Lutheran Church of Glendale*, 482 U.S. at 315-316 and cases cited therein ("the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution"). *See Chicago, Burlington & Quincy R. Co. v. City of Chicago*, 166 U.S. 226 (1896) (Fourteenth Amendment due process clause provides a substantive prohibition against state takings of private property without compensation equivalent to the express prohibition in the Fifth

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[5] As unpublished opinions, the California decisions cited in footnote 2 of the Opposition have no precedential value and may not be cited. *See* Cal. R. of Ct. 8.1120(a) (decision not published "may not be cited or relied on by a court or a party in any other action").

Amendment against such takings by the federal government).

B. Eleventh Amendment Immunity Is Inapplicable.

Respondents, relying on *Alden v. Maine*, 527 U.S. 706 (1999), also claim, for the first time, they are "entitled to Eleventh Amendment Immunity from suit." Opposition, 17. But *Alden* does not stand for the broad proposition that "[t]he Eleventh Amendment grants an arm of a State . . . immunity from being sued in private litigation in both state court and federal court." Opposition, 21. This Court held in *Alden* that the Eleventh Amendment bars Congress from creating private rights of action that are enforceable against the states in state courts. "[T]he powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." *Alden v. Maine*, 527 U.S. at 712. This case does not implicate a Congressionally authorized cause of action. Rather, Petitioners invoke this Court's long-established precedent[6] that "[t]he Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts." *McKesson Corp. v. Division*

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[6] *See Cohens v. Virginia*, 19 U.S. 264 (1821) (rejecting Virginia's Eleventh Amendment challenge to this Court's power on writ of error to review the judgment of a state court involving an issue of federal law).

of Alcoholic Beverages and Tobacco, 496 U.S. 18, 31 (1990). "[W]hen a state court takes cognizance of a case, the State assents to appellate review by this Court of the federal issues raised in the case whoever may be the parties to the original suit, whether private persons, or the state itself." *Id.* at 30 (internal quotations and citations omitted). *See South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 165-167 (1999) (declining to overrule *McKesson*). The California courts have "taken cognizance" of this case and cannot insulate themselves from appellate review of the federal constitutional issues herein by seeking solace in the Eleventh Amendment.

C. The Voluntary Deposit of the Cash Bail Does Not Preclude a Challenge To the Involuntary Taking of the Accrued Interest.

The California court below ruled that the voluntary deposit by Petitioners resulted only in a contractual obligation to return the cash deposit in a timely manner and, since the contract did not provide for interest thereon, there could be no Fifth Amendment taking claim. Pet. App. 7-8, 13-14.[7] In effect, the

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[7] The holding that the cash bail statutes create an implied in-law contract is curious at best. It seems no more a "contract" than the inmate trust account between a prisoner and the Department of Corrections, also a creature of statute and discussed in *Schneider v. California Dept. of Corrections*, 151 F.3d 1194 (9th Cir. 1998).

California court erroneously ruled that a determination of the Fifth Amendment claim was precluded by its implied contract analysis.

Whether the initial cash bail deposit was voluntary or not has no constitutional significance. Petitioners have never claimed that the initial deposit of the principal amount of cash bail was a taking for which the Fifth Amendment required compensation. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216, 234 (2003) (the requirement that client funds be placed in an IOLTA account "is merely a transfer of principal and therefore does not effect a confiscation of any interest"). The entire focus of Petitioners' claims is the accretion of the interest actually earned on the principal amount of the cash bail. The principal was returned; the accrued interest was confiscated.

Whether the initial cash bail deposit is voluntary or coerced is therefore irrelevant to the determination of the constitutionality of the confiscation of the interest earned thereon after exoneration. That interest, under *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998), belongs to the Petitioners as depositors, and Respondents' taking of the interest for general fiscal purposes was undisputedly involuntary. *See Arthur v. District of Columbia*, 857 A.2d 473, 492 n. 23 (D.C. App. 2004) (court found "unavailing" the argument that the Takings Clause did not apply to confiscation of the interest thereon because the deposit was voluntary).

The California court's finding that the terms of the "implied contract do not include a provision for interest on the cash bail deposits," Pet. App. 8, cannot convert the accrued interest from private property to governmental property. Neither the Legislature by statute, nor the court below by judicial decision, can transform property owned by the depositor – the accrued interest on the depositor's cash deposit – simply by reclassifying the property interest as belonging to the state. That is exactly what was condemned in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 164 ("a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power"). *See Schneider v. California Dept. of Corrections*, 151 F.3d at 1200-1201 ("The States' power vis-a-vis property thus operates as a one-way ratchet of sorts: States may, under certain circumstances, confer "new property" status on interests located outside the core of constitutionally protected property, but they may not encroach upon traditional "old property" [such as "interest following principal"]. Were the rule otherwise, States could unilaterally dictate the content of – indeed, altogether opt out of – both the Takings Clause and the Due Process Clause simply by statutorily

recharacterizing traditional property-law concepts").[8] This Court's precedent clearly establishes that the retention by the government of interest earned on principal is a *per se* taking under the Fifth Amendment. *Phillips v. Washington Legal Foundation*, 524 U.S. at 172; *Brown v. Legal Foundation of Washington*, 538 U.S. at 235.[9]

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[8] A long and unreasonable delay in the return of the principal following exoneration might entitle the depositor to damages in tort or contract attributable to the delay. But that issue is quite separate from the Constitutional issue of who is entitled to the interest *actually earned*, that is, the separate quantum of property created on account of the depositor's cash deposit.

[9] Respondents mistakenly contend that no compensable takings claim is available to Petitioners because they failed to avail themselves of the "implied contract" remedy. Opposition, 26-27 and n. 5. Respondents erroneously rely on *Williamson County Regional Planning Com'n v. Hamilton*, 473 U.S. 172 (1985), which holds that any state remedy providing for just compensation must be utilized before resorting to a Fifth Amendment claim. However, California state law alternatives do not provide compensation for interest earned on cash bail deposits, but provide only damages for delay in the return of the principal. Pet. App. 7-8, 13-14. In addition, neither *Ruckelshaus v. Monsanto Co*, 467 U.S. 986, 1016 (1984) nor *Hooe v. United States*, 218 U.S. 322, 335-336 (1910), Opposition, 27, supports Respondents' argument that Petitioners' remedy is "in tort or contract." *Id.* *Ruckelshaus* held the EPA's disclosure of trade secrets was a compensable Fifth Amendment taking, not a tort of contract injury. *Hooe* denied a landlord's takings claim, finding that a government officer had rented property from him for an amount that exceeded express Congressional authority. In contrast to *Hooe*, Respondents' argument is not that the taking of the interest exceeded statutory authority, but rather was pursuant to statutory authority.

D. The Decision of the California Court of Appeal Directly Conflicts With Precedent of This Court and Other Lower Courts.

The decision of the California court below conflicts with this Court's decisions in *Brown, Phillips* and *Webb's Fabulous Pharmacies*, at least two circuit court decisions, *Schneider v. California Department of Corrections*, 151 F.3d 1194; *McIntyre v. Bayer*, 339 F.3d 1097 (9th Cir. 2003); and several state court decisions, including, in California, *Fresno Fire Fighters v. Jernagan*, 177 Cal. App. 3d 403.

Other states have also consistently applied this Court's precedent in a variety of situations, to prevent unconstitutional taking of interest on principal. *See Arthur v. District of Columbia*, 857 A.2d 473; *Moldon v. County of Clark*, 188 P.3d 76 (Nev. 2008) (county placing of interest earned on condemnation deposit into general fund constituted a taking without just compensation); *Sogg v. Ohio Dept. of Commerce*, No. 06AP-883, 2007 WL 1821306, at 4 (Ohio App. 10 Dist. June 21, 2007) (retention of interest earned on unclaimed funds pursuant to state statute violates the takings clause; "unclaimed property is not abandoned property, but rather always remains private property, and pursuant to the 'interest follows principal' rule, the interest earned on private property also constitutes private property"); *B & M Coal Corp. v. United Mine Workers of America*, 501 N.E.2d 401 (Ind. 1986)

(retention of interest earned on appeal bond constituted an impermissible taking).

CONCLUSION

Petitioners respectfully request that this Court grant the Petition for Certiorari.

Respectfully submitted,

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